Commonwealth of Massachusetts

APPEALS COURT

SUFFOLK, SS

No. 2004-P-1653

LUYEN HUU NGUYEN,BUI DIEM,
DINH TU NGUYEN, SANG P. LE.
BATUONG NGUYEN, XUAN M. TRAN, NAM NHAT PHAN
LIEM THANH NGUYEN, and CHUC V. NGUYEN

Plaintiffs - Appellants.

u.

WILLAIM JOINER CENTER FOR THE STUDY OF
WAR AND SOCIAL CONSEQUENCES AND THE
UNIVERSITY OF MASSACHUSETTS, BOSTON

Defendant - Appellee.

On appeal from a judgement of the Suffolk Superior Court

BRIEF FOR APPELLEE

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the Superior Court correctly dismissed the plaintiffs/ complaint for discrimination in a failure-to-hire case where none of the plaintiff s applied for the postion in question?

II. Whether the Superior Court correctly found that the plaintiff s complaint failed to state a claim for M.G.L. c. 151B discrimination because the complaint sought protection for a class of people defined solely by their political beliefs ?

III. Whether the Superior Court correctly dismissed the plaintiffs M.G.L. c. 151C claim because: the plaintiff s failed to allege that they were (a) seeking admission as students or (b)"seeking admission to a program or course of study leading to a degree, beyond a bachelor s degree" (c) the "creed of Communism " is not pretected by that statute; and (d) all plaintiff s failed to fillling their complaint in Superior Court.

IV. Whether the Superior Court correctly found that it had no jurisdiction to rule on the M.G.L. c. 151B claims of eight out of the nine plaintiff s because those plaintiffs failed to file any complaints with the MCAD prior to filing their complaint in Superior Court?

STATEMENT OF THE CASE

On October 27, 2000, plaintiff Luyen Huu Nguyen ("Luyen") filed a complaint at the Massachusetts Commission Against Discrimination (MCAD) against the University of Massachusetts, Boston, claiming a single count of employment discrimination under M.G.L. c. 151B S4. App. 24-25. *. On April 25, 2001, Luyen moved to have his compaint treated as a "class action" at the MCAD. App. 97-101. On May 23, 2001, the MCAD denied this motion for a class action. On Spetember 12, 2001 pursant to Respondents Motion to Dismiss, the MCAD dismissed his complaint and issued a finding that Luyens compaint lacked probable casue. App. 28 -31. The MCADs order of dismissal stated:

> -Complaint failed to establish a prima facie case of disperate treatment/ failure to hire.
> -Complaint failed to establish that he applied for the position. Complaint, through his own admission, states that he did not submitt an application as he did not hear about the fellowship untill after the successful candidates were selected.

App. 105.

On October 29, 2001, plaintiff Luyen and eleven named plaintiffs, on behalf of themselves and a

* Citations to the Appendix, prepared by the plaintiff-Appellants, are referred to throughout this brief as " App. (#) ".

proposed class of Vietnamese-Americans over 40 years old, filed a complaint in Suffolk Superior Court alleging employment discrimination, in violation of M.G.L. c. 151B. Plaintiff filed a Motion to Maintain Class Action on January 10, 2003 which the court denied from the bench after a hearing. The Court s order stated:

> Plaintiff… … .has failed to demonstrate that the proposed class members share common questions of law and fact in this employment discrimination claim, which is of dubious merit in itself. Specifically, the claim rests on the questionable premise that the defendant s alleged failure to more broadly advertise four research positions (two of which were filled by Vietnamese) constitutes a violation of Chapter 151B.

App. 182

Shortly after the issuance of this order, the plaintiff s former cousel, James P. Keane, moved to withdraw from the case.

On November 20, 2003, Attorneys Bradley S. Clanton and James C. Duff appeared Pro Hac Vice on behalf of the plaintiffs in this case. On Febuary 4, 2004, plaintiffs filed An Asseent to Motion to Amend Complaint. This motion explicity preserved the Defendant's rights under M.R..C.P. 12 and 15. App. 186 -187.

On August 27, 2004 the Superior Court, after a hearing, allowed the Defendants

Motion to Dismiss for Failure to Sate a Claim upon which relief could be granted and

for lack of jurisdiction, stating inter alia:

> The defendants Memorandum of law in support to their Motion sets forth numerous reason why the Motion to Dismiss should be allowed. (e.g. failure to exhaust administrative remedies, plaintiffs are not students or individuals undertaking a course of study.) Without repeating all of those arguments, this Court simply notes that these reasons provide alternative grounds for this Courts conclusion that this action should proceed no further. This Court, however, prefers to dispose of the defendants Motion based on a more fundamental defect in the plaintiffs case: none of the plaintiffs applied for the fellowship positions. The plaintiffs repsonse to this is to allege that they would have applied in the year 2000 had they known about the fellowship, but that the method of advertising the positions was itself discriminatory. As to the two subsequent years in which the fellowships were offered, plaintiffs argue that although they knew about the fellowship opportunity, (Luyen) had already filed a discrimination complaint before the MCAD such that all of the plaintiffs believed at that point that any attempt by them to seek a fellwoship would be futile. This Court finds no merit to these arguments.

App. 211 - 212 (internal quotations omitted). The plaintiffs hve filed a timely notice of

appeal of the Superior Courts decesion, as well as their brief. The defendant now files this brief

in response to plaintiffs/ appeal .

STAEMENT OF THE FACTS*

On July 27, 1999, the defendant University of Massachusettes, Boston ("University") And its academic center, the Willaim Joiner Center for the study of War and Social Consequence ("Center") received grant money from the Rockerfeller Foundation to establish research fellowships for the study of the Vietnamese Diaspora ("fellowships"). App 189. These fellowships were intended to allow research into the Vietnamese identity in the post-war and post-refugee eras. App.190.

The plaintiffs are all "Vietnamese-American citizens or permanent United States residents, over the age of 40, with a "national origin" in South Vietnam. App. 200. All of them immigrated to the United States following the fall of Saigon in 1975 and in the years thereafter. App 192 - 195.

On January 4, 2000, the Center distributed information to the public about these fellowships by way of press release and letter. App. 198. This notice did not include the application process or requirements, but did include a deadline of January

* This Statement of Facts is derived from the sixty-two allegations in plaintiffs Second Amended Complaint, which begins on page 189 of the Apppendix.

31, 200 for the applications. Id. The fellowships were also advertised in the publications Hop Luu and Van Hoc. App. 199. In addition, a poster outlining the application process was distributed after January 31, 2000. App.198

During the above time frames, plaintiff Luyen was living in Boston, Masschusetts, but did not learn about the existence of the fellowships untill April 11, 2000, when he read a copy of the January 4, 2000 press release distributed by the Center. App. 192,198. Luyen made no attemt to apply for the year 2000 fellowship, or when it was subsequently offered in 2001 and 2002. App. 198, 200.

On May 12, 2000, Luyen learned that the Center awared the year 2000 fellowship to two individuals who were "admitted agents of the Communist Party of the Socialist Republic of Vietnam," one Caucasian-American by birth under age of 40, and one person of Vietnamese-America descent of approximately 25 years of age. In June of 2000, Luyen told the rest of the plaintiffs named in the complaint ("remaining plaintiffs") about the fellowships and the Centers 2000 selections. Id.

The remaining plaintiffs also failed to apply for the fellowships for the year 2000, and decided not to apply in years 2001 and 2002 "due to the legal proceedings instituted against the defendants," and "based on a reasonable belief that they would have been discriminatorily rejected had they actually applied." App 200. All plaintiffs believe that the successful 2000 fellowship candidates were far less qualified for the fellowships than any of the named plaintiffs. App 199.

Specifically, the plaintiffs charge in their complaint that 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." App.200.

STANDARD OF REVIEW

In reviewing a judgement dismissing a complaint for failure to state a claim on which relief can be granted ("rule 12b (6"), the Court must accept as true all allegations of the complaint and all

reasonable inferences which mya be drawn from the complaint. See Spinner v, Nutt, 417 Mass. 549, 550 (1994)/ Thus, both parties are limited, on an appeal of a 12(b) (6) motion, to the facts that are alleged in the complaint. See id.

A rule 12(b) (6) motion is considerably different from a Rule 56 summary judgment motion in that a Rule 12(b) (6) motion is based on the pleadings and tests the legal sufficiency of the complaint. See Sampson v.Lynn, 405 Mass. 29, 30 (1989). Evidence obtained through discovery is outside the scope of review, unlike a Rule 56 motion which does permit such evidence. * See id.

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*Because the case at bar is an appeal of a 12(b) (6) motion, the plaintiffs attempt call this Court s attention to "certain evidence revealed in discovery" is clearly improper. See Spinner v. Nutt, 417 Mass. at 550; Sampson, 405 Mass at 30. (Brief of Appelants, pg. 29 ftn. 16)

Additionally, the plaintiffs try to expand the scope of the Court s inquiry by referencing facts alleged in a totally separate and unadjudicated case, (Brief of Appellants, pg 35 ftn.20). They cite Jarosz v. Palmer, 49 Mass. App. Ct. 834 (2000), to support their contention that the court "may take judicial notice of… . allegations" that have been made in another pending case between parties before the court. (Brief of Appellants , pg. 35 ftn. 20) (Emphasis Added)

In Jarosz this Court held that the reviewing court must accept as true all well-pleaded allegations in the plaintiffs complaint unless the court knows, because of some other already adjudicated case, that

SUMMARY OF THE ARGUMENT

The Superior Court correctly dismissed the plaintiff complaint. The plaintiffs failed to allege that they applied for the fellowships, and thus cannot establish a prima facie case of hiring discrimination. The plaintiffs fail to allege facts sufficient to show that the defendant s method of advertising the 2000 fellowship was discriminatory. With regards to the 2001 and 2002 fellowships, the plaintiffs calim that it would have been futile to apply does not excuse the fact that they did not apply for the fellowships. This theory of futility is based on the plaintiffs subjective belief that the defendant would have rejected their applications of plaintiff Luyen s pending MCAD action and was not based on any discriminatory act by the defendant . Such a subjective

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the factual allegations in the present case are not true. See Jarosz, 49 Mass. App. Ct. at 835-36. In so holding, this Court was not epanding the univers of factual allegations that the court must take as true but instead allowing the reviewing court to dispose of certain allegations it knew to be false, because the factual issues had already been decided in a previous case. See id. Again, the plaintiffs attempt to persuade the court to consider alleged facts in a case that has not even been decided yet and not alleged in the complaint is clearly improper and violates the Commonwealth s Rules of Civil Procedure. See Mass. R. Commonwealth s Rule of Civil Prodedure. See Mass. R. Civ. P. 12. See also Sampson, 405 Mass. at 30.

belief cannot be the basis for claiming futility in a failure-to-hire case.

Also, the Superior Court was correct in holding that the plaintiffs compliant attempted to establish a protected class solely defined by their political belief, rather than by national origin or age. It is well well-settled law in Massachusettes that political belief cannot form the basis for the protected class under M.G.L. c. 151B or c. 151C. Additionally, on the plaintiffs/ M.G.L. c. 151C claim, the Superior Court correctly found that the plaintiffs were not students as defined by the statute and were not seeking admission to a program offering an advanced degree, as required by the statute.

Finally, the Superior Court correctly found that it lacked jurisdiction over the claims of certain plaintiffs, based on their failure to exhaust administrative remedies. All but one plaintiff failed to file a claim of discrimination with the MCAD prior to bringing this claim in the Superior Court as required by the laws of this Commonwealth. The plaintiffs contention that the defendant waived this defense by not raising it in its answer to the plaintiffs original complaint ignores the well -

Settled doctrine that subject matter jurisdiction cannot be waved, as well as long-established rules of pleading. The defendant properly raised this defense in its response to the Plaintiff s Second Amended Complaint and did not waive it.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY CONCLUDED THAT THE PLAINTIFFS COMPLETE FAILURE TO APPLY FOR THE FELLWOSHIPS DEFEATED THEIR CLAIN OF M.G.L.C. 151B EMPLOYMENT DISCRIMINATION.

In order to establish a prima facie claim of age and national origin discrimination pursuant to M.G.L. c. 151B in a failure-to-hire, case the plaintiffs must show that (1) they are a member of a class protected by M.G.L. c. 151B; (2) they applied for an open position: (3) they were not selected: and (4) the employer sought to fill the position by hiring another individual with similar qualification. * Wynn & Wynn, P.C. v. Mass. Comm n Against Discrimination, 431 Mass. 655, 655 n. 22 (2000). Moreover, proof of discriminatory motive is "critical" in disparate treatment cases. Smith College v. Mass. Comm n

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* Failure to hire cases are similar to failure to promote cases with regards to prima facie elements and fact patterns. (i.e. employer seeking to fill a postion, applicant or current employee seeking to obtain position). Therefore, this brief will also cite to failure to promote cases.

Against Discrimination, 376 Mass. 221, 227 (1978). Although the plaintiffs are pemitted to establish disperate treatment through direct ot circumstantial evidence, the plaintiffs have the burden of proving intentional discrimination. Cox v. New England Tele. And Tele. Co. , 414 Mass. 375, 384-5 (1993).

It is well established law in Massachusetts that a plaintiff claiming discrimination in a failure-to-hire lawsuit must establish that he actually applied for the job. See, e.g. Wynn & Wynn P.C. v. MA Comm n Afainst Disrim. 431 Mass 655, 665 n. 22 (2000) (noting plaintiff s application for job is in an element for a <u>prima</u> <u>facie</u> failure - to - hire case); Santiago v. The Children s Place, 18 MDLR 151,152 (MCAD 1996) (same); Figueroa v. City of Worcester Retirement Sys., 18 MDLR 132, 134 (MCAD 1996). (same.)

A. <u>Plaintiffs fail to establish a prima facie case of discrimination because they did not apply for the fellowships.</u>

The plaintiffs complaint specifically states the <u>none</u> of the plaintiffs applied for the fellowship positions at any time. App. 198-200. Not only did all plaintiffs fail to apply for the fellowship when it was first offered in 2000, but they also failed to apply for the fellowship when it was offered in 2001

and 2002. Id. After learning that two alleged "communists" were awarded two of the year 2000 fellowships, the plaintiffs decided to file a lawsuit instead of filing their application. App. 107. None of the plaintiffs applied for the fellowships, thus none of them can establish a prima facie case of discrimination for failure to hire. See e.g. , Wynn & Wynn P.C., 431 Mass. At 665 n. 22; Santiago, 18 MDLR at 152; Figueroa, 18 MDLR at 134.

Moreover, by not applying for any of the fellowships, the plaintiffs have forever deprived the defendant of the opportunity to rebut any claim of direct disparate treatment towards the plaintiffs. The defendant never had an opportunity to consider the candidacies of the plaintiffs because they were unaware of their existence. Because the defendant had no knowledge of the plaintiffs or their intent to apply for the Fellowships , it is impossible for the plaintiffs to ever prove that the defendant possessed a "discriminatory motive" towards any of the individual plaintiffs. Smith College, 376 Mass. at 227 (proof of discriminatory motive is critical to a showing of disparate treatment) .

B. <u>No discriminatory inference can be drawn from the Depfendant s methods of advertising the year 2000 fellowships.</u>

Despite the plaintiffs contention that the method of advertising the year 2000 fellowships was discriminatory, as the Superior Court stated, the mere fact that the defendant chose to advetise as they did is not evidence that it intended to discriminate against the plaintiffs. App. 212 (J. Sanders, Memorandum of Decision and Order on Defendants Motion to Dismiss). See also EEOC v. Consolidated Services Systems, 777 F. Supp. 599, 607 (N.D. Ill., 1991) (fact that the employer advertised in Korean-language newspaper does not demonstrate that he harbored intent against non-Koreans).

As long as the defendant advertised the position and had no knowledge of the plaintiffs interest in the fellwoship, no inference can be made from the chosen method of advertising. See Chambers v. Wynne Sch. Dist. 909 F. 2d 1214,1217 (8th Cir. 1990) (in a failure to promote case, court held that where the employer advertised the position and did not know about the plaintiff s interest in the job, no inference of discrimination can be made with respect to the methods of advertising).

As the plaintiffs allege, the defendant advertised the fellowships. App 198 - 199. They acknowledge that the press release and letter were sent out weeks before the application deadline and that the fellowships were advertised in two journals, Hop Luu and Van Hoc. Id. The plaintiffs fail to allege that the defendant knew that any of the plaintiffs were interested in the fellowships. Thus, discrimination cannot be inferred from the defendant s method of advertising the fellowships. See Chambers, 909 F. 2d at 1217; Consolidated Services Systems, 777 F. Supp. At 607.

Common sense dictates that the defendant cannot be expected to individually contact every person that could conceivably be interested in the felowship in order to ensure that they are notified of the open position. Responsibility for meeting deadlines and seeking help in applying must be placed on the applicant once the public has been reasonably notified of the opening. As the Superior Court stated, nothing about the method of advertising gives " rise to any rational inference of age discrimination" or raises the presumption that " the defendants intended to or

did exclude” the defendants from applying for fellowship. App.212.

C. Plaintiffs cannot invoke the “futile gesture doctrine to escuse their failure to apply for the 2001 and 2002 fellowships because that failure was based merely on their subjective belief that they would not be awarded the fellwoship and not based on any specific discriminatory action by the defendant.

The plaintiffs attempt to excuse their failure to apply for the 2001 and 2002 fellowships by claiming that it would have been futile for them to apply. Under the “futile gesture doctrine” a plaintiff does not have to appy for a position in order to establish a prima facie claim of discrimination if he can overcome “the not always easy burden” of showing that they would have applied for the job if not for the employer s obstruction. Int l. Bhd. Of Teamsters v. United States, 431 U.S. 324, 365 (1977). See also Harris v. White, 479 F. Supp. 996, 1008 (D. Mass. 1979); Leo v. Plymouth Dist. Ct. , 18 MDLR 60, 62 (MCAD 1996).

While creating an exception to the application requirement, courts have made it clear that a claim of futility cannot be based merely on the plaintiffs subjective belief that they would not be hired. This belief must be coupled with evidence of actual

discrimination by the defendant. See Teamsters, 431 U.S. at 365; Lewis v. Tobacco Workers Int l Union, 577 F.2d 1135,1143 (4th Cir. 1978). (holding that claim of futility cannot be based on subjective belief of the plaintiffs but instead on some objective discriminatory action taken by the employer).

In order to avail themselves of this expection, the plaintiffs" complaint must allege that the defendant made statements to the plaintiffs in order to deter them from applying for the fellowships or that the defendant had a systematic policy or repeated discrimination such that one would reasonably deterred from applying for the fellowships. See, e.g., Teamsters, 413 U.S. 324 (failure to apply not required because of the company s systematic policy regarding seniority and also because applicants were given false of misleading information about the availability of the position). Winbush v. State of Iowa By Glenwood State Hosp. 66 F.3d 1471, 1481 (8th Cir., 1995) (court found that application was not required because either the position was not advertised or the employer misled them to believe that applying would be futile) ; Lewis v. Boston Public Health Comm. 25 MDLR 353, 355-56 (2003) (plaintiff s failure to apply for job that

was essentially a reposting of the job she was just fired from was excusable because employer misled her to believe that postion was being eliminated): Leo, 18 MDLR at 62 (applicant could reasonably have inferred that it would have been futile to apply because employer had falsely told her that he already chosen someone else) ; Bowen v. Colonnade Hotel, 2 MDLR 1400, 1402, 1409 (MCAD 1974) (futile for applicant to apply for position when employer misled her by telling her that position was no longer available).

The claim of futility that plaintiffs advance in their brief is similar to the one rejected in Lewis v. Tobacco Workers International Union. 577 F. 2d at 1143. In Lewis, the 4th Cirtuit refused to find discrimination where the plaintiffs did not actually apply for the job. Id. The plaintiffs claimed that they believed it was futile to apply for certain positions because the company kept blacks and whites segregated. See Lewis, 577 F. 2d at 1137, 1142. They did not show that the employer actually discriminated in hiring or intended to keep blacks and whites separate. See id.at 1142. In rejecting the plaintiffs claims, the court stated that a claim of futility must be based on some direct evidence that

the employer did in fact discriminate. See id. at 1143. The mere subjective belief that they would not be hired, as the plaintiffs claim in the case at bar, is not sufficient to claim futility. See id.

The plaintiffs fail to allege that any official from the University of Massachusetts gave them false or misleading information about the fellowships or told them not to apply. Nor do they allege that they were deterred from applying because of a systematic policy on part of the defendant to discriminate. Rather, the plaintiffs claim that they did not apply because they believed they would be refected because plaintiff Luyen filed a complaint with the MCAD. App. 200. Because their claim of futility rests solely on their subjective belief, the Superior Court was correct in holding that their failure to apply for the fellowship barred the plaintiffs M.G.L.c.151B claim.

II. THE SUPERIOR COURT CORRECTLY FOUND THAT THE PLAINTIFFS FAILED TO ESTABLISH A CLAIM FOR M.G.L.. C. 151B AGE DISCRIMINATION BECAUSE DISPARATE IMPACT AGE DISCRIMINATION CLAIMS ARE NOT RECOGNIZED IN MASSACHUSETTS AND THE PLAINTIFFS FAILED TO ALLEGE THE AGE OF TWO OF THE FOUR FELLWOSHIP RECPIENTS.

A. Disparate impact age discrimination claim are not recongnized in Massachusette.

There is no cause of action for disparate impact age discrimination in Massachusetts. The first Circuit has held that under both Massachuetts and Federal law, age discrimination claims grounded on a theory of disparate impact are not viable. Mullin v. Raytheon Co. , 164 F. 3d 696, 697, 704 (1st Cir. 1999) (analysis of Massachussetts decision on viability of disparate impact age claims) ; Felbotte v. Dow Jones & Co. , 51 F. Supp. 2d 36, 44 (D. Mass 1999).

The Superior Court properly dismissed the plaintiffs disparate impact age discrimination claim because such a claim is not recongnized by Massachusette court thus the plaintiffs failed to state a claim upon which relief could be granted.

B. The plaintiffs failed to allege facts sufficient to establish a claim of disparate treatment age discrimination because they fail to allege the ages of two out of the four 2000 fellowship recipients and fail to allege the age of any of the 2001 - 2002 fellwoship recipients.

Age discrimination may only be logically inferred when the postion is given to someone who is "substantially younger" than the plaintiff. O Connor v. Consolidated Coin Caterers Corp. 517 U.S. 308, 313 (1996) ; Knight v. Avon Products, Inc. 438 Mass. 413, 422 (2003) (holding that an age disparity of less than

five years, by itself, is too insignificant to support a prima facie case of age discrimination).

The plaintiffs fail to allege the age of the remaining two recipients of the year 2000 fellowships*. Additionally, the plaintiffs fail to allege any characteristics, including their age, of the people selected for the 2001 or 2002 fellowships.

In thei complaint the plaintiffs state that

> (t)he Defendants selected candidates (for the 2000 fellowship) with insufficient qualifications, no experience of the Vietnamese Diaspora, and in some instances admitted agents of the Communist Party of the Socialist Republic of Vietnam. (Of the four candidates selected one was) under the age of 40 (and another was) approximately 25 years of age. The candidates selected were far less qualified than the Plaintiffs.

App. 199.

Absent the alleged ages of all the people selected for the fellowships, no logical inference of age discrimination can be made. See O Connor, 517 U.S. at 313 ; Knight, 438 Mass. at 422. Thus, the plaintiffs fail to establish a prima facie case of age disrimination.

III. THE SUPERIOR COURT WAS CORRECT IN HOLDING THAT THE PLAINTIFFS ATTEMPTED TO ESTABLISH A PROTECTED CLASS

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* The Superior Court noted this and reasoned that such a failure would necessarily defeat the plaintiffs claim of age discrimintion. App. 212, ftn. 2.

SOLELY DEFINED BY POLITICAL BELEIFS AND THUS NOT PROTECTED BY THE ANTI-DISCRIMINATION LAWS OF THE COMMONWEALTH.

In order to establish a prima facie case of age and nationail origin discrimination, the plaintiffs must allege that the defendant s practice or policy had a disparate impact on members of a protected class to which he or she belongs. EEOC v. Steamship Clerks Union, Local 1066, 48 F. 3d 594, 601 (1st Cir. 1995). The Supreme Judicial Court has held that M.G.L. c. 151B does not protect discrimination founded on polictical or social beliefs. See Opinion of the Justices of the house of Represemtatives, 423 Mass. 1244 (1996); Harvard Law School Coalition of Civil Rights v. President & Fellows of Harvard College, 413 Mass 66, 68 - 70 (1992).

A. The plaintiffs fail to allege that any practice or policy of the defendant had a disperate impact on a protected class with respect to national origin.

The Supreme Court has defined "national origin" as referring " to the country where a person was born, or, more broadly, the country from which his or her ancestors came. Espinoza v. Farah Manufacturing Co. , Inc. 414 U. S. 86, 88 (1973).

Groups of people who share the same country of origin have not been afforded national origin status based on the individual region or sections of that country. Claim of national origin discrimination on the basis of being a southern (Confederate) American have been Rejected because southern Americans are not distinct from northern Americans. See Storey v. Burns International Security Service, 390 F. 3d 760. 762-63 (3rd Cir. 2004) ("Confederate Southern America" is not a protected class); Chaplin v. Du Pont Advance Fiber Systems, 293 F. Supp. 2d 622, 628 (E.D. Va. 2003) (citing Terrill v. Chao, 31 Fed. Appx. 99 (4th Cir. 2002) ("Confederate American" can not claim national origin discrimination because plaintiff could not claim a distinct physical identity); Williams v.Frank, 757 F. Supp. 112, 120 (D. Mass 1991) (Southerness is not a protected trait). In these cases, the courts rejected any notion that there is a distinction between Americans from the south and from the north. The courts also rejected the claim that Confederate Americans are a distinct group because they share some common culture or history of persecution. See Storey 390 F. 3d 760, 762 - 63.

All of the paintiffs allege that they were born sometime between 1923 (Plaintiff BUI Diem) and 1942 (Plaintiff Nam Nhat PHAN). App. 192 - 195. During this entire time, the country now know as Vietnam was part of the French protectorate of Indochina (officially known as the "Indochinese Union") and was not knows as "South Vietnam" or the "Republic of Vietnam." The Vietnam War Almanac, Harry G. Summers, Jr. 16 (3rd ed. (1999)* (in 1887 France formed the Indochinese Union that included Vietnam, which lasted until 1945, when the Democratic Republic of Vietnam was proclaimed). As the plaintiffs point out, the political entity known as South Vietnam lasted for only twenty-one (21) years, from 1954 to 1975. (Brief of Appellants, pg. 39). South Vietnam did not exist when the plaintiffs were born and does not exist as a country today. See Summer, supra, at 16. Today, the area where the plaintiffs were born in is officially known as the Socialist Republic of Vietnam. CIA World Factbook, Vietnam, at

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*The Vietnam War Almanac by Harry G. Summers, Jr. is the same source the plaintiffs cite to support their argument that Vietnam did not exist as a "catch all" classification. While this source is not included in the Appendix, the Defendant requests that this Court take judicial notice of the historical fasct contained therein.

http: //www.cia.gov/cia/publications/factbook/geos/vm.html (last modified June 2, 2005) .

Additionally, contrary to the plaintiffs claim, the "catch all" classification of the "Vietnamese" people has existed for more than one thousand years. (Brief of Appelants, pg. 39). "Vietnam is one of the world s oldest nations. It s legendary past stretch(es) back to the third millennium BC…… .." Summers, supra, at 2. For nearly nine hundred years, beginning in 946 AD when Vietnam won its independence from China until 1867 when France made it a colony, Vietnam was an independent and sovereign nation. Summer, supra, at 3, 13, 16. throughout this entire nine hundred years period, the Vietnamese people developed a sophisticated governmental structure, a distinct language, and their own version of Buddhism. Summers, supra, at 5. Any clain that Vietnam and its people did not exist historically as a single and distinct country is not historically accurate. See Summers, supra, at 2.

Thus, under the standard articulated by the Supreme Court the plaintiffs claim of national origin discrimination would be one of "Vietnamese" and not "South Vietnamese". See Espinoza, 414 U.S. at 88.

In claiming their orgin as “South Vietnamese” the plaintiffs are attempting to distinguish themselves from those who hold similar national traits, I.e. Vietnamese, who happen to reside in the north of the country. The complaint does not allege any distinct physical characteristics between these two groups. The only distinction between these two groups is found in their respective political ideologies. As stated above, M.G.L. c. 151B does not recongnize this distinction. See Opinion of the Justices, 413 Mass. At 1246; Harvard Law School Coalition of Civil Rights, 413 Mass. at 68 -70. The distinction claimed by the plaintiffs is similar to the distinction claimed by “Confererate Americans” which has repeatedly been refected by courts. See Storey, 390 F. 3d at 762 - 63; Chaplin, 293 F. Supp. 2d at 628; Williams, 757 F. Supp. at 120.

Under the accepted standard, the national origin that is being claimed by the plaintiffs should be that of Vietnamese” or at least a classification that is the same as three out of the four fellowship recipients. Thus, their M.G.L. c. 151B claim nesessarily fails because three out of the four

fellowships were filled by Vietnamese*. Such undisputed facts show that any actions took did not discriminate against any group of people sharing the same national origin of the plaintiffs.

IV. THE SUPERIOR COURT WAS CORRECT IN DIMISSING THE PLAINTIFFS M.G.L. C. 151C CLAIM FOR FAILURE TO SATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

A. <u>The compaint does not allege that the plaintiffs are seeking admission as "students" as required by M.G.L. c. 151C S 2(a).</u>

M.G.L. c. 151C S 2 (a), prohibits educational institutions from discriminating against "any United States citizens seeking admission as <u>students</u> on the basis of race, religion, creed, color, or national origin." (Emphasis added). The plaintiffs in their complaint fail to allege that they were seeking admission as "students"." On the contrary, the complaint alleges that the Fellowships were treated as "employees" and completed IRS Form W-4 and were issued a W-2 for income tax purposes. App. 197. The plaintiffs allege that the fellowship positions were subject to the University s Hiring Guide and

* In addition to their M.G.L. c. 151B clain, the fact that three out of four fellowships were filled by Vietnamese also defeats the plaintiffs M.G.L. c. 151C claim. M.G.L. 151C requires a prima facie showing of discrimination against a protected the class of "Vietnamese-Americans" Has been alleged.

should have complied with the policies of the Human Resources Department at the University. App. 196 - 197. As pled, the fellowship positions were clearly not educational but instead were employment positions. Accordinly, such positions do not fall under the protection afforded by c. 151C .

B. The complaint does not allege that the plaintiffs were "seeking admission to a program or course of study leading to a degree beyond a bachelor s degree" as required by M.G.L. c. 151C, S2(d).

M.G.L. c. 151C, S 2 (d) prohibits discrimintion against "any person seeking admission to a program or course of study leading to a degree beyond a bachelor s degree... " (emphasis added.) As stated previously, the complaint fails to allege that any plaintiff actively sought admission to any program at the University because they failed to apply for the fellowships. Additionally, the complaint fails to allege that the fellowships were a "program or course of study leading to a degree beyond a bachelor s degree." On the contrary, the complaint alleges that the fellowships were a "program or course of study leading to a degree beyond a bachelor s degree. On the contrary, the complaint alleges that the fellowships were "temporary and/or grant-funded positions", governed by the University Hiring Guide and that the Center was required to "consult with HR prior to filling any temporary position in order to

insure that the University's hiring polocies and procedures were followed. App. 196.

The plaintiffs argue that M.G.L. c. 151C protects any person seeking admission to any "program" even if it does not lead to a degree beyond a bachelor's degree. (Brief of Applellants, pg. 49). Such a stance clearly misreads the statute and seeks to broaden the scope of M.G.L. c. 151C beyond what the legislature intedned.

A reading of M.G.L. c. 151C S2(d), in its entirety, reveals that "program" and "course of study" are both modified be the clause "leading to a degree, beyond a bachelor's degree." This subsection also prohibits discrimination against " any student admitted to such program or course of study in providing benefits, privileges and placement services." Id. (emphasis added). The placement of the word "such" before " program" and "course of study" reveals that the legislature was referring to a specific type of program and course of study. The word "such" refers back to the only possible modifier in the sentence, and that is "leading to a degree, beyond a bachelor's degree".

That such a interpretation could lead to the"absurd" result that M.G.L. c. 151C would not prohibit discrimination against students in non-advanced degree programs, does not grant this Court the authority to rewrite the statute. Contrary to the plaintiffs' unsubstantiasted assumption regarding the "intent of the legislature in drafting c. 151C," M.G.L. c. 151C does not prohibit all acts of discrimination in education. See Barret v. City of Worcester Sch. Dept., 2001 WL 1602832 (MCAD 2001) (no redress for discrimination against students once they are admitted to a secondary school).

In Oliver c. Holyoke Community College, 2001 WL 1602767 (MCAD 2001), the MCAD highlighted the limitations of M.G.L. c. 151C, and regretfully admitted that they lacked authority to "amend a statute deemed to be inconsistent and therefore lacking in essential protections for students. Id. Thus, regardless of its limited protection for "all students" M.G.L. only protected students seeking admission to programs leading to advanced degrees. Plaintiffs have failed to allege that the fellowships lead to <u>any</u> degree, and have consequently failed to state a proper claim.

C. The “creed of Communism is not protected by M.G.L. c. 151C.

M.G.L. c. 151C offers no protection for political beliefs within the plain language of the stature. See M.G.L. c. 151c. The complaint alleges that the defendant discriminated against the plaintiffs by favoring the “creed of Communism”, a political belief espoused by wo of the four fellows hired. App. 203.

The plaintiffs attempt to equate “Communism” to a religious belief or creed and to manufacrure a protection under M.G.L. c. 151C. Id.

Citing Wolfe v. Gormally, 440 Mass. 699 (2004), the plaintiffs argue that because c. 151C uses both the terms “religion” and “creed”, that “creed” can not be interpreted to mean “religious creed” as it does in c. 151B. While this argument employs an accepted canon of statutory construction, their argument neglects numerous other canons which undermine their analysis of the statute.

In addition to stating that a statute must be construed to give effect to all its provisions, the Supreme Judical Court in Wolfe qualified the use of this canon with a mumber of additional canons. See Wolfe, 440 Mass. at 704. The court stated that a

statute must also be interpreted "so as to make it an effetual piece of legislation in harmony with common sense and sound reason" and that it "must be viewed as a whole" and that "it is not proper to confine interpretation to the one section to be construed." Wolfe, 440 Mass. at 704 I citing Masasachusetts Comm'n Against Disrcrimination v. Liberty Mut. Ins. Co. , 371 Mass. 186, 190 (1976).

Under this standard, c. 151C must be viewed as a whole. M.G.L. c. 151C is unique in that it does not establish an independent right of action. All c. 151C claims must be brought in court under c. 151B, S9. (Any person claiming to be aggrieved by a practice made unlawful...... under chapter one hundred and fifty-one C,....may....bring a civil action for damages...." M.G.L. c. 151B S9.) Thus in order to give effect to this provision, c. 151C must be interpreted in conjunction with c. 151B. M.G.L. c. 151B does not define "creed" to include political thought or beliefs.

M.G.L. c, 151B S 4 explicitly states that:

> "(T)he words 'creed or religion' mean any sincerely held religious beliefs, without regard to whether such beliefs are approved, espoused, prescribed required by an established church or

other religious institutions or organizations." (Emphasis added.)

"Communisim" is defined as "(a) system of government in which the state controls the means of production and a single, often authoritarian party holds power." The American Heritage Dictionary 299 (2d College ed. 1991). Some interpretations of the communist doctrine may prohibit certain religious beliefs but, as the definition above suggest, the movement is a "system of government," not a religious institution or organization.

In Opinion of the Justices, 423 Mass. at 1246, the court held that there is no claim for discrimination based on political beliefs in Massachusette. In that case, the court repeated that M.G.L. c. 151B only offered protection for "religious beliefs" and did not extend that protection of political thought. Id. at 1245 - 6. Furthermore, there are no reported decisions in Massachusetts holding that M.G.L. c. 151C extends protection to political thought, and such a protection is also not found in the body of c. 151C. Any effort to broaden the definition or creed to include the creed of Communism

ignores the context in which M.G.L. c. 151C is placed and unjustifiably adds language to the statute.

D. All plaintiffs failed to file complaints with the MCAD alleging M.G.L. c. 151C education discrimination.

A plaintiff alleging disrimination cannot plead new claims that he did not orginally raise before the MCAD, Mole v. Univ. of Massachusette, 58 Mass. App. Ct. 29, 47 (2003) (citing Lattimore v. Polaroid Corp., 99 F. 3d 456, 464 (1st Cit. 1996). The Supreme Judicial Court has noted that trial courts "must view critically any legal theory now claimed" that was not presented at the MCAD. Smith College, 376 Mass. at 224-4 (noting trial court judge should have disregarded new factual conclusions not advanced before the MCAD).

Plaintiff Luyen failed to allege c. 151C eduction discrimination in his October 27, 2000 complaint filed with the MCAD, App. 24- 25. Luyen's MCAD complaint is limited to a single claim of employment discrimination, and failed to mention any allegation of "education" discrimination. Id. Moreover, plaintiffs' inital complaint filed in this action failed to allege a c. 151C violation. App. 107 - 120.

Therefore because Luyen failed to raise any claims M.G.L. c. 151C claims at the MCAD, the Superior Court was correct to conclude that it lacked jurisdiction and dismiss this claim.

V. THE SUPERIOR COURT WAS COEECT IN CONCLUDING THAT IT HAD NO JURISDICTION TO RULE ON THE CLAIMS OF CERTAIN PLAINTIFFS BECAUSE THESE PLAINTIFFS FAILED TO FILE COMPLAINTS WITH THE MCAD PRIOR TO INTIATING THEIR SUIT IN SUPEROR COURT.

A. Plaintiffs, Bui Diem, Dinh Tu Nguyen, Sang P.Lee,Ba Tuong Nguyen, Xuan M. Tran, Nam Nhat Phan, Liem Thanh Nguyen and Chuc V. Nguyen did not file complaints with complaints with the MCAD and, therfore, cannot maintain actions under M.G.L. c. 151B or 151C in Massachusette Court.

A party must file a timely complaint with the MCAD in order to maintain an action under M.G.L. c.151B or c, 151C in Massachusetts Superior Court. Charland v. Muzi Motors, Inc., 417 Mass. 580, 583 (1994): Christo v. Edward G. Boyle Ins. Agency, Inc., 402 Mass. 815, 816 (1988). "Resort to the courts is not available for a complaint of discrimination within the jurisdiction of the MCAD unless the person claiming to have been the object of unlawful discrimination first makes a timely complaint to that agency." Charland, 417 Mass. at 583 - 84. The court will dismiss a complaint unless it was initially filed with the MCAD on a timely basis. See Mouradin v.

General Electric Co., 23 Mass App. Ct. 538, 541 (1987) (barring plaintiff from rising claims in Superior Court when plaintiff did not file timely with the MCAD) ; Sereni v. Star Sportswear Mfg. Corp., 24 Mass App. Ct. 428, 429-30 (1987) (affirming directed verdict when plaintiff did not file M.G.L. c. 151B claim with the MCAD). Finally, all such complaints must be filed with the MCAD within 30 days of the alleged discriminatory act, or they will be time-barred. M.G.L. c. 151B S5.

In the case at bar, all plaintiffs, with the exception of plaintiff Luyen and his M.G.L. c. 151B claim, failed to file a complaint with the MCAD for the claims that are contained in the plaintiffs' Second Amended Complaint. Plaintiffs' Second Amended Complaint does not allege any of the plaintiffs filed any action at the MCAD. Despite the plaintiffs' failure to plead this basic jurisdictional requirement in their complaint, the defendant will concede that on October 27, 2000, Plaintiff Luyen filed a complaint with the MCAD, listing himself as the sole complainant in an action against the William Joiner Center, and failed to name or mention any of the remaining plaintiffs in this complaint. App. 86 -87. Plaintiff

Luyen later moved to amend his complaint at the MCAD to add a class action. App. 97 - 101. This motion was opposed by the University and denied by the MCAD. App. 28 - 31. This decision was not appealed and the remaining plaintiffs never failed individual complaints with the MCAD. App.22. In addition, the MCAD decision denying Luyen's compaint lists a single complaint filed by Luyen and makes no mention of the existence of any other complainants to that action. App 28 31.

Therefore, because the remaining plaintiffs failed to file individual MCAD complaints and failed to satisfy a condition precedent to filling a c. 151B suit in Superior Court, the Superior Court was correct in concluding that it lacked jurisdiction to hear the plaintiffs' claims.

Additionally, the remaining plaintiffs are time- barred from filing complaints at the MCAD and thus can never satisfy a condition precedent to filling their claim in Superior Court. Plaintiffs' complaint alleges that the remaining plaintiffs first learned about the defendant's alleged disriminatory acts in June, 2000. App. 199. All c. 151B discrimination complaints must be filed with the MCAD within 300 days.

of the alleged discriminatory event. * "M.G.L. c. 151, S5. Thus, the remaining plaintiffs had until approximately April, 2001 to file individual complaint with the MCAD. They failed to file any individual complaints with the MCAD.Therefore, the remaining plaintiffs are time barred from filing complaints with MCAD and they will never be able to fulfill this condition precedent to filing a c. 151B claim in Superior Court. Thus their claims were rightly dismissed with prejudice by the Superior Court.

B. This defense was not waived by the Defendant because it is a jurisdictional defense and cannot be waived, and was nonetheless , timely raised in its response to the plaintiffs' Second Amended Complaint.

Recent Superior Court decisions have ruled that filing a complaint with the MCAD is a jurisdictional requirement for a plaintiff to sure in Superior Court under M.G.L. c. 151B. See Curtis v. City of Fitchburg,

* The statute of limitations for actions filed in the MCAD was 180 days at the time of the alleged discriminatory act in this matter, (May or June, 2000). This limitation period was extended prospectively to 300 days effective November 5, 2000. See Mass. Acts of Gen. Ct. 2000 c. 223~~ ~~ 1, 4. Thus, the 180 day limitation peroid, rther than the 300 day period, may apply to the conduct alleged in this complaint. Under either analysis, the plaintiffs are time barred.

2003 WL 21500532 (Mass. Super. 2003) ; Dorman v. Norton Co., 2003 WL 1962458 (Mass. Super. 2003) .

Claims of lack of jursdiction cannot be waved by either party. See e.g. Jamgochian v. Dieker, 425 Mass. 565, 567 - 68 (1997) (partyy's failure to raise jursdictional claim does not bar it from raising it later because jurisdictional claims cannot be waved) ; Littleton Business Sys v. Comm'r of Revenue, 383 Mass. 619, 622 (1981) (subject matter jurisdiction cannot be conferred by consent, conduct, or waver).

It is well-settled law that "(w)henever the plaintiff ameds his declaration, the defendent of course has liberty to replead..." Green v. Moses Gill, Executor, 5 Mass. 379, 380 (1809). See also Wright v. Hollingsworth Lessee, 26 U.S. (1 Pet.) 165, 169 (1828) (upon admendment being made to declaration, the defendant had a right to plead de novo) ; Thompson v. Musser, 1 U.S. (1 Dall.) 458 (1789) (it is error to allow an amendment to the complaint without giving the defendant the opportunity to answer) .

Despite the plaintiffs' contention, the defendant did not waive its defense that certain plaintiffs' failure to file in the MCA barred their claims in Superior Court. The claim was made in the Defendant's

Memorandum of Law in Suppert of its Motion to Dismiss plaintiffs' Amended Complaint . App. 8 - 11 . The plaintiffs argue that because the defense was not raised in the answer to the first complaint any subsequent response is barred from raising it. (Brief of Appellants, pg. 45 - 46).

The plaintiffs ignore long-standing principles of responsive pleading when they attempt to limit the defendant to its answer to the orginal complaint. The defendant has a right to respond to any claim put forward by the plaintiffs. This defendant exercised this right in a timely fashion by filing its motion to dismiss. App. 1-2. Defendant's Motion to Dismiss raised the claim that certain plaintiffs failed to file in the MCAD. App. 6-11. Thus, the claim was not waived and was properly accepted by the Superior Court.

C. Plaintiff's reliance on Christo v. Edward C. Boyle Ins. Agency to support their claim that the MCAD filing requirement can be ignored by Massachusette courts is misplaced and greatly exaggerates the relivance of its holding to the case at bar.

The plaintiffs cite to the Superme Judical Court's decision in Christo v. Edward C. Boyle Ins. Agency, 402 Mass 815 (1998) , to support their

contention that a defense of failure to echaust administrative remedies can be waived by the defendant, (Brief of Appellants, pg. 44 - 45)

In Christo, the court rerterates the well - settled rules that " before intiating (a discrimination claim under M.G.L. 151B S9 in Superior Court) the plaintiff must have filed a timely complaint within six months of the act of discrimination (with the MCAD)" Christo, 402 Mass. at 817. While the court stated that this requirment , is subject to equitable tolling, it did not decide whether the limitation should be tolled in that case , but remanded it for decsision by the Superior Court. Id. at 817 , 819. The court simply held that the Superior Court was not bound by the MCAD investigator's determination of the tolling question. Id. at 818. Contrary to Plaintiffs' argument, (See Brief of Appellants, pgs. 44 - 48), the court did not state that the MCAD filing requirement could be ignored by the Superior Court. See id.

Additionally, at most, the court implied that the tolling of the MCAD filing requirement could be allowed if there was some showing that the defendant misled the plainftiff or discouraged her from filling a timely complaint with the MCAD. Christo, 402 Mass at

816. The plaintiffs do not allege in their complaint that they were misled or discouraged by the defendant from filing a claim with the MCAD. In fact, the plaintiffs offer no explanation for the plaintiffs' failure to file in the MCAD. The fact that plaintiff Luyen was able to make a timely complaint in the MCAD is evidence that the other plaintiffs had the opportunity to satisgy the filling requirements of M.G.L. c. 151B but, for reasons not mentioned in their complaint, failed to do so.

Without alleging any effort on the part of the defendant to mislead or dissuade the plaintiffs from filing acomplaint with the MCAD, the requirement that the plaintiffs first file in the MCAD cannot be wavied by the defendant. See Charland, 417 Mass. at 583; Christo, 402 Mass at 816.

CONCLUSION

For all the foregoing reasons, the defendant respectfully requests that the Superior Court's decision allowing the motion to dismiss and the order dismissing the complaint be affirmed.

Dated: June 20, 2005

Respectfully submitted,
UNVERSITY OF MASSACHUSETTES,
BOSTON.
By Their Attorney,

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ADDENDUM

COMMONWEALTH OF MASSACHUSETTES

SUFFOLK, ss **SUPERIOR COURT**

No. 01 – 4507

LUYEN HUU NGUYEN, et al.

Plaintiffs

v.

WILLIAM JOINER CENTER FOR THE STUDY OF WAR AND SOCIAL CONSEQUENCES, and UNIVERSITY OF MASSACHUSETTES BOSTON

Defendants

MEMORANDUM OF DECESSION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

This is an action alleging discrimination in the method by which the defendants advertised for and ultimately selected individuals for certain fellowship position in a program to promote research into the Vietnamese identity in the era following the Vietnam War. Plaintiffs concede that they never applied for the position but nevertheless allege, in a three-count Second Amended Complaint, violarions of G>L.c. 151B and 151C. The defendants now move to dismiss the Second Amended Complaint pursuant to Rule 12(b)(1) and 12 (b) (6), Mass. R. Civ. P. This Court concludes that the Motion must be **Allowed** , for the following reasons.

BACKGROUND

The Second Amended Complaint sets forth the following relevant factual allegations, which this Court assumes to be true for purpose of this Motion. On July 27,1999, the defendants, the William Joiner Center (the"Center") and the University of Massachusettes at Boston (the"University"). were awarded a grant from the Rockefeller Foundation of New York.

funding a research program entitled "Constructing Identity and Place in the Vietnamese Diaspore." The study was inteded to look into "how diverse constructions of Vietnamese
identity and community...are being shaped and reshaped to the contemporary post – war and post-refugee eras across generations" following the Vietnam War. These fellowships
temporary postions funded on a yearly basis. Those who received the fellowships were afforded certain faculty privileges, which included access to the University's library and office space provided by the Center.

Plaintiffs are all over the age of 40 and were all born and raised in South Vietnam.
Some of them were officers in the South Vietnamese Army during the Vietnam War, others were government officals in South Vietnam, eductors and journalists. They all immigrated to this country following the fall of Saigon and in the years thereafter. Luyen Huu Nguyen is the only plaintiff who resides in Boston.

On January 4, 2000 the Center dissminated information to the public about the fellowships it was offering. It did so by way of a press release and a letter; it also advertised in two Vietnamese publications, Hop Luu and Van Hoc. The deadline for filing applications was January 31, 2000. Four people were awarded the fellwoships. The group consisted of "two" admitted agents of the Communist Party" who immigrated to the United States from North Vietnam, a "Caucasian-American" by birth under the age of 40," and "one person of Vietnamese American descent" under 40.

None of the plaintiffs received information about the fellowships before January 31,2002 deadline, although Nguyen, the Boston plaintiff, did learn of the program in April 2000. Nguyen informed the other plaintiffs. Fellowships were offered for the years of 2001 and 2002.

None of the plaintiffs applied for the positions.

Because the Motion to Dismiss raises certain jurisdictional issues, a breif review of the procedural history of this matter is also in order. It began with the filing of a complaint on October 27, 2000 with the Massachusetts Commission Against Discrimination ("MACD"). The complaint was brought by a single individual, plaintiff Nguyen, and asserted a single count of employement discrimintion under G.L.C. 151B against the University. On April 25, 2001, Nguyen sought to amend the complaint to have the action proceed as a class action. The pleading, entitled "Amendment to Charge of Discrimination to have the Action Treated as a Class Action", named in its caption additional plaintiffs, who sought to proceed (according to the caption) "Individually and as Representatives of the Class." The request to amend the MCAD complaint was summarily denied on May 23, 2001.

On Spetember 12, 2001, the MCAD dismissed Nguyen's complaint after a finding that it lacked probable cause. On October 29, 2001, Nguyen instituted this action, alleging employment discrimination under G.L.c. 151B. After the Court denied his Motion to Maintain a Class Action and Nguyen changed legal counsel after amending the Complaint once, he successfully sought to amend the Complaint a second time so as to add additional plaintiffs and additionl counts. Within a month of recieving notice of the amendment, the defendants filed the instant motion, seeking to dismiss the Second Amended Complaint.

DISCUSSION

The plaintiffs allege that the defendnts's actions, "including the timing and method of the advertisement, publications and announcement of the Fellwoships, and the evaluation and selection of the Fellowship recipients, were take with deliberate, improper and illigal intent

to exclude members of the Vietnamese-american community over the age or 40. including the Plaintiffs. "Second Amended Complaint S42. The Second Amended Complaint seeks relief for employment discrimination under G.L.c. 151B, proceed on a disperate treatment theroy) (Count I) as well as a disperate impact theory (Count II). In adition, the plaintiffs allege discrimination in education, seeking relief unfer G.L.c. 151C (Count III) Central to the plaintiffs' case is their postion that, because they are natives of South Vietnam, their national origin is distinct from those who immigrated to the United States from North Vietnam. In selecting individuals with roots in North Vietnam allied with the Communist regime there, the defendants (it is contended) have unlawfully discriminated against the plaintiffs.

The defendants' Memorandum of Law in support of their Motion sets forth numerous reasons why the Motion to Dismiss should be allower. Without repeating all of those arguments, this Court simply notes that these reasons provide alternative grounds for this Court's conclusion that this action should proceed no further. Some of these arguments do not directly address the nature of the plaintiffs' claims but rather point out procedural deficiencies.For example, other than Nguyen, no plaintiff filed a complaint with the MCAD*. This failuer to exhaust administrative remedies means that this Court has no jurisdiction to entertain those plaintiffs' claims under either G.L.C 151B or 151C. Charland v. Muzi Motors Inc., 417 Mass 580, 583 - 586 (1994). The defendants also make certain statutory arguments which warrant dismissal of at least some of the plaintiffs' claims. Thus, the defendants point out that G.L.c. 151C, by its

* I agree with the defendants position, set forth in footnote 2 of their Memorandum, that the attempt to amend Nguyen's MCAD complaint in April 2001 to have it proceed as a class action does not satisfy the requirement that each individual plaintiff file an MCAD complaint in a timely fashion.

terms, protects "students" who seek admission to an educational institution, as well as any "person seeking admission to a program or course of study leading to a degree, beyond a bachelor s degree...." See G.L.c. 151C S2(a) and S2(d). Those accepted for the fellowships, however, are neither students nor individuals who are undertaking a course of study in order to obtain as advanced degree. Accordingly, Count III should be dismissed for failure to state a claim under 151C.

This Court, however, prefers to dispose of the defendants Motion based on a more fundamental defect in the plaintiffs case: none of the plaintiffs applied for the fellowship positions. Among the elements of any discrimination case under G.L.c. 151B is the requirement that the plaintiff applied for the position and was not selected. See e.g. Wynn & Wynn P.C. v . MCAD 431 Mass 655, 665 n. 22 (2000). Similarly, under G.L.c. 151C, the plaintiffs must have sought and have been denied admission to an educational institution or educational program. In the instant case, it is conceded that, even after being informed of the fellowships in the spring of 2000, none of the plaintiffs submitted applications for either 2001 or 2002 even though applications were being accepted. Nor are there any allegations that the defendants did anything to discourge or deter the plaintiffs from applying. Because the defendants never recieved any application from the plaintiffs and therefore took no adverse action with respect to them, there is no possibility that the plaintiffs will be able to prove that the defendants discriminated against them. Stated another way, the plaintiffs will be unable to prove that they have suffered any particulairzed harm.

The plaintiffs responce to this is to allege that they would have applied in the year 2000 had they known about the fellowships, but that the method of advertising the positions was itself

discriminatory. As to the two subsequent years in which the fellowships were offered, plaintiffs argue that, although they knew about the fellowship opportunity. Nguyen had already filed a discrimination complaint before the MCAD, such that all of the plaintiffs beleived at that point that any attempt by them to seek a fellowship would be futile. This Court finds no merit to these arguments.

First, with respect to the method of advertising, the only facts alleged in support of the allegation that it was intenntionally discriminatory are that the notice for the position in 2000 was circulated by press release and by letter 26 days before the deadline, and that it was published in only two Vietnamese publications. Although this is alleged to have violated the terms of the Program Description put together by the defendants, see Second Amended Complaint 29 - 30, This Court fails to see how these facts could possibly constitute unlawful discrimination. Certainly, there is nothing about the method to give rise to any rational inference of age discrimination or that the defendants intended to or did exlude Vietnamese from being notified, the notice having appeared in two Vietnamese publications. Indeed, of those accepted for the 2000 fellowships, three were of Vietnamese origin.*

Second, this is not the kind of case where the doctrine of futility of applies. That doctrine was first announced in International Brotherhood of Teamster v. United States, 431 U.S. 324 (1997), where there had been a showing of class wide discriminatory practice in adwarding line-driver jobs so as to exclude blacks. In upholding the lower courts decision to extend relief to those plaintiffs who had not actually applied for a ling drive job, the Superior Court held that,

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*The second Amended Complaint does not specify how old two of the four reciepients were in the year 2000, nor does it allege anywhere that only those under 40 were accepted for fellwoships - an essential fact, it would seem, to the plaintiffs claim of age discrimination.

where there is a consistently enforced discriminatory policy which excludes minorties, then it isnot an "inexorable bar" to relief that a particular plaintiff has not engaged in the wholy futile gesture of applying. By way of example, the Court noted that, if an employer posted a sign stating the only whites need to apply, his victims "would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs". Id. at 365. The Superior Court went on to qualify its holding, however, by adding that the non applicant must nevertheless demonstrate that he was deterred from applying for the job precisely because of the discriminatory practices. In the instant case, the plaintiffs do not allege any facts tp show a causal link between any policy or practice of the defendants and their failure to submitt applications for the degendants consideration. Rather, they allege that they did not apply because of their own belief that with Nguyen s complaint pending before the MCAD, all of them would be rejected even if they fully qualified for the positions. Courts have not recongnized this as a sufficient reason for excusing plaitiffs with a discrimination claim from applying for a position and being rejected.

Finally, even apart from this fatal defect in the plaintiffs case, the plaintiffs attempt to place themselves within a group protected by either G.L.c. 151B or 151C fails.
Their claim is not simply that the defendants discriminate against persons over 40 or that defendants discriminate against persons of Vietnamese ancestry. Rather, it is that the defendants awarded fellowships to those who adhered to or were sympathetic with the Communist government of North Vietnam (now the Socialist Republic of Vietnam, which encompasses South Vietnam as well). There is no case law, however, to support the conclusion that a group defined essentally by its policitcal beliefs are deserving of some special protection under the anti-discrimination laws. Indeed, to expose an academic institution to liability because it failed to select those with

anti-Communist views for research fellowships would have a chilling effect on the institutions own First Amendment rights.

„**CONSLUSION AND ORDER**

For all the foregoing reasons and for the reasons set forth in the Defendants Memorandum of Law, the defendants Motion to Dismiss is **ALLOWED,** and it is hereby **ORDERED** that the Second Amended Complaint is **DISMISSED,** with prejudice.

Janet L. Sanders
Justice of the Superior Court

Dated: August 27, 2004.

COMMONWEALTH OF MASSACHUSETTES

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 01-4507E

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)
v.)
William Joiner Centre for the Study)
of War and Social Consequences and the)
University of Massachusetts, Boston)
)
Defendants)
)

MOTION OF THE DEFENDANT, WILLIAM JOINER CENTER AND THE UNVERSITY OF MASSACHUSETTES BOSTON, TO DISMISS PURSUANT TO MASS.R. CIV. P. 12(b)(1) AND 12(b)(6).

The Defendant in the above action, the William Joiner Centre at the University of Massachusetts, Boston moves pursuant to Mass R, Civ. P. 12(b)(1) and 12(b)(6) to dismiss Counts I, II, and III of plaintiffs" Second Amended Complaint.

As reasons therefore the Defendant states that the court lacks subject matter jurisdiction over all claims made by Plaintiffs Bui Diem, Dinh Tu Nguyen, Sang Phuoc Le, Ba Tuong Nguyen, Xuan M. Tran, Nam Nhat Phan, Liem Thanh Nguyen and Chuc V. Nguyen, because these individuals failed to file claims with the Massachusettes Commission Against Discrimination, prior to filing their complaint with this court. In

M.G.L.A. 151B S4

MASSACHUSETTS GENERAL LAWS ASSNOTATED
PART 1. **ADMINISTRATION OF THE GOVERNMENT**
TITLE XXI. **LABOUR AND INDUSTRIES**
CHAPTER. 151B . **UNLAWFUL DISCRIMINATION BECAUSE OF RACE, COLOR RELIGIOUS CREED, NATIONAL ORIGIN, ANCESTRY OR SEX.**
=> S 4. Unlaful practices.

It shall be an unlawful practice:

1. For an employer, by himself or his agent, because of the race, color, religious, national origin, sex sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, or ancestry of any individual to refuse to hire or employ or to be bar or to discharge from employment such individual or to discriminate against such individual is compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

1A. It shall be unlawful discriminatory practice for an employer to impose an individual as a condition of obbtaining or retaining employment any terms or conditions, complianace with which would require such individual to violate , or forego the practice of, his creed or religion as required by the creed or religion including but not limited to the observence of any particular day or days or any portion thereof as a sabbath or holy day and the employer shall make reasonable accommondation to the religious needs of such individual. No individual who has given notice as hereinafter providde shall be required to remain at his place of employment during any day or days or portion thereof that, as a requirement of his religion, he observes as his sabbath or other holy day, enculding a reasonable time prior and subsequent thereto for travel between his place of employment and his home, provided, however, that any employee intending to be absent from work when so required by his creed or religion shall notify his or her employer not less than ten days in advance of each absence, and that any such absence from work shall, wherever practicable in the judgement of the employer, be made up by an equivalent amount of time at some other mutual convient time. Nothing under this subsection shall be deemed to require an amployer to compensate an employee for such absence. "Reasonable Accommodation", as used in this subsection shall mean such accommodation to an employee's or propective employee s religious observance or practice as shall not cause undue hardship in the conduct of the employer's business. The employee shall have the burden of proof as to the required practice of his creed or religion. As used in this subsection, the words "creed or religion" mean any sincerely held religious beliefs, without regard to whether such beliefs are approved, epoused, prescribed or required by an established church or other religious institutions or organization.

Undue hardship, as used herein, shall include the inability of an employer to provide services which are required by and in compliance with all federal and state laws, including regulations or tariffs promulgated or required by any regulatory agency having jurisdiction over such services or where the health or safety of the public would be unduly compromised by the absence of such employee or employees, or where the employer's presence is indispensabel to the orderly transaction of business and his or her work cannot be performed by another employee of substantially similar qualifications during the peroid of absence, or where the employee's presence is needed to alleviate an emergency situation. The employer shall have the burden of proof to show undue hardship.

1B. For an smployer in the private sector, by himself or his agent, because of the age of any individual, to refuse to hire or employ or to bar ot to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, condition or privileges of employment, unless based upon a bona fide occupational qualification.

1C. For the commonwealth or any of its political subdivisions, by itself or its agent, because of the age of any individual, to refuse to hire or employ or to bar or discharge from employment such individual in compensation or in terms, conditions or privileges of employment unless pursuant to any other general or special law.

<(Subsection ID as inserted by 2004, 335, Sec. 1 effective December 22, 2004.)>

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1D. For an employer , an employment agency, the commonwealth or any of its polictical subdivisions, by iself or its agents, to deny initial employment, reemployment, retention in employment, promotion or any benefit of employment to a person who is a member of, applies to perform or has an obligation to perform, service in a uniformed military service of the United States, including the National Guard, on the basis of that membership, application or obligation.

2. For a labor organization, because of the race, color, religious creed, national origin, sex, sexual orientation, which shall not included persons whose sexual orientation involves minor shildren as the sex object, age, genetic information, or ancestry of any individual, or because of the handicap of any person alleging to be a qualified handicapped person, to exclude from full membership rights or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer unless based upon a bona fide occupational qulification.

3. For any employer or employment agency to print ot circulate or cause to be printer or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry or record in connection with employment, which expresses directly or indirectly, any limitations, specifications or driscrimination as to the rece, color, religious creed, national origin, sex, sexual orientation which shall not include persons whose sexual orientation invloves minor children as the sex object, age, genertic information or ancestry of the handicap of a qualified handicapped person or any intent to make such limitation, specification or driscimination, or to discriminate in any way on the ground of race, color, religious creed, national origin, sex, sexual orientation, age, genetic information, ancestry or the handicap of a qualified handicapped person, unless based upon a bona fide occuptional qualification.

3A. For any person engged in the insurance or bonding business, or his agent, to make any inquiry or record of any person seeking a bond or surely bond conditioned upon faithful performance of his duties or to use any form of application in connection with the furnishing of such bond, which seeks information relative to the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information or ancestry of the person to be bonded.

3B. For any person whose business includes granting mortgage loans or engging in residentail real esate-related transactions to discriminate against any person in the granting or any mortgage loan or in making available such a transaction, or in the terms or conditions of such a loan or transaction, because of race, color, religion, sex, sexual orientation which shall not include persons whose sexual orientation involves minor children as the sex object, children, national orgin, gentic information, ancestry, age or handicap. Such transactions shall include, but not be limited to:

(1) the making or purchasing of loans or the provision of other financial assistance for purchasing, constructing, improving, reparing, or maintaining a dwelling: or the making or purchasing of loans or the provision of other financial assistance secured by residential real easte; or

(2) the selling, brokering, or appraising of resdential real estate.

In the case of age, the following shall not be an unlawful practice:

(1) an inquiry of age for the purpose of determining a pertinent element of credit worthiness;

(2) the use of an empirically derived credit system which considers age; provided, however, that such syatem is based on demonstrably and statistically sound data; and provided, further, that such system does not assign negative factor or score to any applicant who has reached afe sixty-two;

(3) the offering of credit life insurance or credit disablilty insurance, in conjunction with any mortgage loan, to a limited age group;

(4) the failure or refusal to grant any mortage loan to a person who has not attained the age of majority;

(5) the failure or refusal to grant any mortgage loan the duration of which exceeds the life expectancy of the applicant as determined by the most recent Individual Mortality Table.

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Nothing in this subsection prohibits a person in engaged in the business of furnishing appraisals of realy property from taking into consideration factors other than those hereinabove proscribed.

3C. For any person to deny another person access to, or membership or participation in, a multiple listing service, real estate brokers' organizations, or facility relating to the business of selling or renting dwellings, or to drisciminate against such person in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, sexual orientation which shall not include pesons whose sexual orientation involves minor children as the sex object, children, national origin, genetic information, ancestry, age or handicap.

4. For any person, employer, labour organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five.

4A. For any person to coerce, intimidate, threaten, or interfere with another person in the excerise or enjoyment of any right granted or protected by this chapter, or to coerce, intimidate, threaten or interfere with such other persons for having aided or encouraged any other person to the excerise or enjoyment of any such right granted or protected by this chapter.

5. For a person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so.

6.For the owner, lessee, sublessee, licensed real estate broker, assignee or managing agent to publicly assisted or multiple dwelling or contiguously located housing accommodation or other person having the right of ownership or possession or right to rent or lease, or sell or negotiate for the sale of such accommodations, or any agent or employee of such a person, or any organization of unit owners in a condominium or housing cooperative: (a) to refuse to rent or lease or sell or negotiate for sale or otherwise to deny to or withold from any person or group of persons such accommodation because of race, religious creed, color, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, gentic information, ancestry or martial status of such person or persons or because such person is a veteran or member of the armed forces, or because such person is blind, or hearing impaired or has any other handicap. (b) to discriminate against any person because of his race, religious creed, color, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, ancestry or martial status or because such person or veteran or member of the armed forces, or because such person is blind, or hearing impaired or has any other handicap in the terms, conditions or privileges of such accommodations, or the acquisitions thereof, or in the furnishings of facilities and services in connection therewith, or because such a person possesses a trained dog guide as a consequence of blindness, or hearing impairment; (c) to cause to be made any written or oral inquiry or record concerning the race, religious creed, color, nation origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry or material status of the person seeking to rent or lease or buy any such accommodation, or concerning the fact that such person is a veteran or a member of the armed forces or because such person is blind or hearing impaired or has any other handicap. The word "age" as used in this subsection shall not apply to persons who are minors nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in housing developments assisted under the federal low income housing tax credit and intended for use as for persons 55 years of age or over, or 62 years of age or over, nor to residency in communities consisting of either a structure or structures constructed expressly for use as housing for persons 55 years of age or over or 62 years or over on 1 parcel or on contiguous parcels of land, totaling at least 5 acres in size. For the purpose of this subsection, housing intended for occupancy by persons fifty-five or over and sixty-two or over shall comply with the provisions set forth in 42 USC 3601 et seq.

For purposes of this subsection, discrimination on the bases of handicap includes, but is not limited to, in connection with the design and construction of: (1) all units of a dwelling which has three or more units and an elevator which are constructed for first occupancy after March thirteenth, nineteen hundred and ninety-one ; and (2) all ground floor unites other dwellings consisting of three or more units which are constructed for first occupacy after March thirteenth, nineteen hundred and ninety one, a failure to design and construct such dwellings in such a manner that (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons; (ii) all doors are designed to allow passage into and within all premises within such dwellings and are sufficiently wide to allow passage by handicapped persons in wheelchairs; and (iii) all premises within such dwellings contain the following features of adaptive designs, (a) an

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accessible route into and through the dwelling; (b) light switches, electrical outlets, thermostats and other enviromental controls in accessible locations; (c) reinforcements in bathroom walls to allow later installation of grab bars; and (d) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

7. For the owner, lesse, sublessee, real estate broker, assignee or managing agent of other covered housing accommodations or of land inteded of any housing accommodation included under subsection 10,11,12 or 13 of section one, or other person having the right of ownership or possession or right to rent or lease or sell or negotiate for the sale or lease of such land or accommodation, or any agent or employee of such a person or any organization of unit owners in a condominium or housing cooperative: (a) to refuse to rent or lease or sell or negotiate for sale or lease or otherwise to deny or withold from any person or group of persons such accommodation or land because of race, religious creed, national origin, sex, sexual orientation which shall not include persons whose sexual orientation involves minor children as the sex object, age, gentic information, ancestry, or martial status, veteran status or membership in the armed forces, blindness, hearing impairment or because such person possesses a trained dog guide as a consequence of blindness or hearing impairment or other handicap of such a person or persons; (b) to discriminate against any person because of his race, color, religiou creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, or martial status, veteran status or membership in the armed forces, blindness or hearing impairment or other handicap, or because such person possesses a trained dog guide as a consequence of blindness or hearing impairment in terms, conditions or privileges of such accommodations or land or the acquisition thereof, or in the furnishing of facilities and services in the connection therewith or (c) to cause to be made any written or oral inquiry or record concerning the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose eexual orientation involves minor children as the sex object, age, genetic information, ancestry, martial status, veteran status or membership in the armed forces, blindness, hearing impairment or other handicap or because such person possesses a trained dog guide as a consequence of blindness or hearing impairment, of the person seeking to rent or lease or buy such accommodtaion or land; provided however, that this subsection shall not apply to the leasing of a single apartment or flat in a two family dwelling, the other occpupancy unit of which is occupied by the owner as his residence. The word "age" as used in this subsection shall not apply to persons who are minors nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in housing developments assisted under the federal low income housing tax credit and intended for use as housing for persons 55 years of age or over or 62 years of age or over, nor to residency in communities consisting of either a structure or structers constructed expressly for use as housing for persons 55 years of age or over or 62 years of age or over, on 1 parcel or on contiguous parcels of land, totaling at least 5 acres in size. For the purpose of this subsection, housing intended for occupancy by person fifty-five or over and sixty-two or over shall comply with the provisions set forth in 42 USC 3601 et.seq.

7A. For purposes of subsection 6 and 7 disrimination on the basis of handicap shall include but not limited to:

(1) a refusal to permit or to make, at the expense of the handicapped person, reasonable modification of existing premises occupied or to be occupied by such person if such modification is neccessary to afford such person full enjoyment of such premises; provided however that, in the case of publicy assisted housing, multiple dwelling housing consisting of ten or more units, or contiguously located housing consisting of ten or more units, reasonable modification shall be at the expense of the owner or other person having the right of ownership; provided , further, that in the case of public ownership of such housing units the cost of such reasonable modifiction shall be subject to appropriation; and provided further, that, in the case of a rental, the landlord may, where the modification to be paid for by the handicapped person will materially alter the marketability of the housing, condition permission for a modification on the tenant agreeing to restore or pay for the cost of restoring, the interior of the premises to the condition that existed prior to such modifictation, reasonable wear and tear excepted:

(2) A refusal to make reasonable accommodations in rules, policies or services when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling; and

(3) discrimation against or a refusal to rent to a person because of such persons need for reasonable modification or accommodation.

Reasonable modification shall include but not be limited to, making the housing accessible to mobility-impaired, hearing impaired and sight-impaired person including installing raised nubers which may be read by a sight-impaired person, installing a door bell which flashes a light for a hearing-impaired person, lowering a cabinet, ramping a front entrance of five

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or fewer vertical steps, widening a doorway, and installing a grab bar; provided, however that for purposes of this subcestion, the owner or other person having the right of ownership shall not be required to pay for ramping a front entrance of more than five steps or for installing a wheelchair lift.

Notwithstanding any other provisions of this subsection, an accomodation or modification which is paid for by the owner or other person having the right of ownership is not considered to be reasonable if it would impose an undue hardaship upon the owner or other person having the right of ownership and shall therefore not be required. Factors to be considered shall include, but not limited to, the nature and cost of the accomodation or modification needed, the extent to which the accomodation or modification would materially alter the marketability of the housing, the overall size of the housing business of the owner or other person having the right of ownership, including but not limited to, the number and type of housing units, size of budget and avaiable assets, and the ability of the owner or other persons having the right of ownership to recover the cost of the accommadation through a federal tax deduction. Ten persent shall be the maxium number of units for which an owner or other person having the right of ownership shall be required to pay for a modification in order to make units fully assessible to persons using a wheelchair pursant to the requirements of this subsection.

In the event a wheelchair accessible unit becomes or will become vacant, the owner or other persons having the right of ownership shall give timely notice to a person who has, within the previous twelve months, notified the owner or person having the right of ownership that such person is in need of a unit which is wheelchair accessible, and the owner or other person having the right of ownership shall give at least fifteen days notice of the vacancy to the Massachuestts rehabilitation commission, which shall maintane a central registry of accessible apartment housing under the provisions of section seventy-nine of chapter six. During such fifteen day notice period, the owner or other persons having the right of ownership may lease or agree to lease the unit only if it is to be occupied by a person who is in need of wheelchair accessibility.

Notwithstanding any general or special law, by-law or ordinance to the contrary, there shall not be established or imposed a rent or other charge for such handicap-accessible housing which is higher than the rent or other charge for comparable nonaccessible housing of the owner or other person having the right of ownership.

7B. For any person to make print, or publish, or cause to be made, printed or published any notice, statement or advertisement, with respect to the sale or rental of multiple dwelling, contiguously located, publicly assisted or other other covered housing accomodations that indicates any preference, limitation, or discrimination based on race, color, religion, sex, sexual orientation which shall not include persons whose sexual orientation involves minor children as the sex object, national origin, genetic information, ancestry, children, martial status, public assistance recipiency, or handicap or an intention to make any such preference, limitation or dircrimination expect where otherwise legally permitted.

8. For the owner, lessee, sublesse, or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent or lease, commercial space: (1) To refuse to sell, rent, lease or otherwise deny to or withhold from any person or group of persons such commercial space because of race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry handicap or martial status of such person or persons. (2) To discriminate against any person because of his race, color, religion creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, handicap or martial status in the terms, conditions or privileges of the sale, rental or lease of any such commercial space or in the furnishing of facilities or services in connection therewith. (3) To cause to be made any written or oral inquiry or record concerning the race, color, religious creed, nation origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, handicap or martial status of a person seeking to rent or lease or buy any such commercial space. The word "age" as used in this subsection shall not apply to persons who are minors, nor to residency in state-adided or federally- aided housing developements for the elderly nor to residency in self-contained retirement communities constructed expressly for use by the elderly and which are at least twenty acres in size and have a minium age requirement for residency of at least fifty-five years.

9. For an employer, himself or through his agent, in connection with an application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any persons, or in any other matter relating to the employment of any person, to request any information, to make or keep a record of such information, to use any form of application or application blank which resquests such information, or to exclude, limit or otherwise discriminate against any person by reason of his failure to furnish such information through a written application or oral inquiry or otherwise

regarding: (i) and arrest, detention or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors : drunkenness, simple assault, speeding, minor traffic violtions, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such appication for employment or such request for information , unless such person has been convicted of any offense within five years immediately preceeding the date of such application for employment or such request for information.

No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.

Nothing contained herein shall be construded to affect the application of section thirty-four of chapter ninety-four C, or of chapter two hundred and seventy-six relative to the sealing of records.

9A. For an employer himself or through his agent to refuse, unless based upon a bonafide occuptional qualification, to hire or employ or to bar or discharge from employment any person by reason of his or her failure to furnish information regarding his or her admission, on one of more occasions, voluntarily or involuntarily, to any public or private facility for the care and treatment of mentally ill persons, provided that such person has been discharged from such facility or facilities and can prove by a psychiartrist s certificate that he is mentally competent to peform the job or the job for which he is applying. No application for employment shall contain any questions or requests for information regarding the admission of an applicant, on one or more occasions, voluntarily or involuntarily, to any public or private facility for the care and treatment of mentally ill persons, provided that such applicant has been discharged from suc public or private facility or fcilities and is no longer under treatment directly related to such admission.

10. For any person furnishing credit, services or rental accomodations to discriminate against any individual who is a recipient of federal , state, or local public assistance, inculding medical assistance, or who is a tenant receiving federal. state, or local housing subsidies, including rental assistance or rental supplements, because the individual is such a recipient, or because of any requirement of such public assistance, rental assistance, or housing subsidy program.

11. For the owner, sublessees, real estate broker, assignee or managing agent of publicy assisted or multiple dwelling or contiguosuly located housing accommodation or other covered housing accommodations, or other person having the right of ownership or possession or right to rent or lease or sell such accommodation, or any agent or employee of such a person or organization of unit owners in a condominium or housing cooperative, to refuse to rent or lease or sell or otherwise to deny to or withhold from any person such accommodations because such person has a chil or children who shall occupy the premises with such person or to discriminate against any person in the terms, conditions or privileges of such accommodations or the acquisition thereof, or in the furnishing of facilities and services in connection therewith, because such person has a child or children who occupy or shall occupy the premises with such person; provided, however, that nothing herein shall limit the applicabily of any local, state, orfederal restriction regarding the maximum number of persons permitted to occupy a dwelling. When the commission or a court finds that discrimination in violation of this paragraph has occurred with respect to a residential premises containg dangerous levels of lead in paint, plaster, soil or other accessible material, notification of such finding shall be sent to the director of the childhood lead poisoning prevention program.

This subsection shall not apply to:

(1) Dwellings containing three apartment or less, one of which appartments is occupied by an elderly or infim person for whom the presence of children would constitute a hardship. For purposes of this subsection an "elderly person" shall mean a person sixty-five years of age or over, and an "infirm person" shall mean a person who is disables or suffering from a chronic illness.

(2) The temporary leasing or temporary subleasing of a single family dwelling , a single apartment, or single unit of a condominium or housing cooperative, by the owner of such dwelling, apartment, or unit, or in the case of subleasing, by the subessor thereof, who ordinairly occupies the dwelling, apartment, or unit as his or her principle place of residence. For purpose of this subsection, the term "temporary leasing" shall mean during a period of the owners's or sublessor's absence not to exceed one year.

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(3) The leasing of a single dwelling unit in tow faily dwelling, the other occupancy unit of which is occupied by the owner as his residence.

11A. For an employer, by himself or his agent to refuse to restore certain female employees to employment following their absence by reason of a maternity leave taken in accordance with section on hundred and five D of chapter one hundred and forty nine or to otheriwse fail to comply with the provisions of said section, or for the commonwealth and any of it boards, departments and commission to deny vacation credits to any female employee for the fiscal year during which she is absent due to maternity leave taken in accordance with said section or to impose any other penalty as a result of a maturnity leave of absence,

12. For any retail store shich provides credit or charge account privileges to refuse to extend such privileges to a customer soley because said customer had attained age sixty-two or over.

13. For any person to directly or indirectly induce, attemp to induce, prevent, or attempt to prevent the sale, purchase, or rental of any dwelling or dwellings by:

(a) implicit or explicit representations regarding the entry or prospective entry into the neighbourhood of a person or persons of a particular age, race, color, religion, sex, national or ethnic origin, or economic level or a handicapped person, ora person having a child, or implicit or explicit repersentations regarding the effects or consequences if any such entry ro prospetive entry;

(b) unrequested contact or communication with any person or persons, initiated by any means for the purpose of so inducing or attemping to induce the sale, purchase, or rental of any dwelling or dwellings when he knew or, in the execise of reasonable care, should have known that such unrequested solication would reasonably be associated by the persons solicited with the entry into the nieghborhood of a person or persons of a particular age, race, color, religion, sex, national or ethnic origin, or economic level or handicapped person or person having a child;

(c) implicit or explicit false respersentation regarding the availbility of suitable housing within a particular neighborhood or area, or failure to disclose or offer to show all properties listed or held for sale or rent withing a requested price or rental range, regardless of location; or

(d) false representations regarding the listing, prospective listing, sale, or prospective sale of any dwelling.

14. For any person furnihsing credit or services to deny or terminate such credit or services or to adversely affect an individual's credit standing because such individual's sex, martial status, age or sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object; provided that in the case of age the following shall not be unlawful practices:

(1) an inquiry of age for the purpose of determining a pertinent element creditworthiness;

(2) the use of empirically derived credit systems which consider age, provided such systems are based on demonstrably and statistically sound data and provided further that such systems do not assign a negative factor or score to any applicant who has reached age sixty-two;

(3) the offerning of credit life insurance or credit disability insurance, in conjunction with any credit or services, to a limited age group;

(4) the denial of any credit or services to a person who has not attainted the age of majority;

(5) the denial of any credit of any credit or services the duration of which exceeds the life expenctancy of the applicant as determined by the most recent Individual Auunity Mortality table; or

(6) the offering of more favorable credit terms to students, to persons aged eighteen to twenty-one or to persons who have reached the age of sixty-two.

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Any person who violates the provisions of this subsection shall be liable in an action of contract for the actual damages; provided, however, that, if there are no actual damages, the court may assess special damages to the aggrieved party not to exceed one thousand dollars; and provided further, that any person who has been found to violate a provision of this subsection by a court of competent jurisdiction shall be assessed by the cost of reasonable legal fees actually incurred.

15. For any person responsible for recording the name of or establishing the personal indentification of an individual for any purpose, including that of extending credit, to require such individual to use, because of such individual's sex, or martial status, any surname other than the one by which such individual is generally known.

16. For any employer, personally or through an agent, to dismiss from employment or refuse to hire, rehire or advance in employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essentail functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limintations of the person would impose an undue hardship to the employer's business. For the purpose of this subsection the word employer shall include an agency which employs individuals directly for the purpose of furnishing part-time or temporary help to to others.

In determining whether an accommodation would impose an undeu hardship on the conduct of the employer's business, factors to be considered include:--

(1) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets;
(2)the type of the employer's operation, including the composition and structore of the employer's workforce; and

(3) the nature and cost of the accommodation needed,

Physical or mental job qualification requirement with respect to hiring, promotion, demotion or dismissal from employment or any other change in employment status or responsibilities shall be functionally related to the specific job or jobs for which the individual is being considered and shall be consistent with the safe and lawful performance of the job.

An employer may not make preemployment inquiry of an applicant as to wheather the applicant is a handicapped individual or as to the nature or severity of the handicap, except that an employer may condition an offer of employment on the result of a medical examination conducted soley for the purpose of determining whether the employee , with
resonable accommodation, is capable of performing the essential fuctions of the job, and an employer may invite applicants to voluntarily disclose their handicap for purpose of assisting the employer in its affirmative action efforts.

16A. For an employer, personally or through its agents to sexually harass any employee.

17. Notwithstanding any provision of this chapter, it shall not be an unlawful employment practice for any person, employer, labor organization or employment agency to:

(a) observe the terms of a bona fide seniority or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to encade the purpose of this section, except that no such employee benefit plan shall excuse the failure to hire any person, and no such seniority system or employee benefit plan shall require or permit the involuntary retierement of any person because of age except as permitted by paragraph (b).

(b) require the complusory retirement of any person who has attained the age of sixty-five and who, for the two year period immidiately before retirement, is amployed in a bona fide executive or high policymaking position, if such person entitled to an immediate nonforfeitable annual retirement benefit from a penson, profit-sharing, savings or deferred compensation plan, or any combination of such plans, of the employer, which equals , in the aggregate, at least forty-four thousand dolars.

(c) require the retirement of any employee who has attained seventy years of age and who is serving under a contract of unlimited tenure or similar arrangement providing for unlimited tenure at an independent institution of higher education.or to limit the employment in a faculty capacity of such an employee, or another person who has attained seventy years of age who was formely employed under a contract of unlimited tenure or similar arrangement, to such terms and to such a period as

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would serve the present and future needs of the institution, as determined by it; provided, however, that in making such a determination, no institution shall use as qualification for employment or reemployment, the fact that the individual is under any particular age.

18. For the owner, lessee, sublesse, licensed real estate broker, assignee, or managing agent of publicly assisted or multiple dwelling or contiguously, located accommodtion or other covered housing accommodations, or other person having the right of ownership or possession or right to rent or lease, or sell or negotiate for the sale of such accommodation, or any agent or employee of such person or any organization of unit owners in a condominium or housing cooperative to sexually harass any tenant, propesctive tenant, purchaser or prospective purchaser of property.

Notwithstanding the foregoing provisions of this section, it shall not be an unlawful employment practice for any person, employer, labor organization ot employment agency to inquire of an applicant for employment or membership as to whether or not he or she is a veteran or a citizen.

Notwithstanding the provisions of any general or special law nothing herein shall be sonstrude to bar any religious or denominational institution or organization, or any organization operated for chartiable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.

Notwithstanding the foregooing provisions of this section, (a) every employer, every employment agency, including the division of employment and training and every labor organization shall make and keep such records relating to race, color, or national origin as the commission may prescribe from time to time by rule or regulation, after public hearing as reasonably necessary for the purpose of showing compliance with the requirements of this chapter, and (b) every employer and labor organization may keep and maintain such records and make such reports as may from time to time be necessary to comply, or show compliance with, any excutive order issued by the President of the United States or any rules or regulation issued thereunder prescribing fair employment practices for contractors and subcontractors under contract with the United States, or, if not subject to such order, in the manner prescribed therein and subject to the jurisidiction of the commission. Such requirements as the comission may, by rule or regulation, prescribe for the making and keeping of records under clause (a) shall impose no greater burden or requirements on the employer, employment gency or labor organization subject thereto, than the comparable requirements which could be prescribed by Federal rule or regulation so long as no such requirements have in fact been prescribed, or which have in fact been prescribed for an employer, employment agency or labor organization under the authority of the Civil Rights Act of 1964, from time to time amended. [FN1] This paragraph shall apply only to employers who on each working day in each of twenty or more calendar weeks in the annual period ending with each date set forth below, employed more employees than the number set forth beside such date, and to labor organizations which have more members on each such working day during such period.

Period Ending	Minimum Employees or members.
June 30, 1965	100
June 30, 1966	75
June 30, l967	50
June 30, 1968 and thereafter	25

Nothing contained in this chapter or in any rule or regulation issued by the commission shall be interpreted as requiring any employer, employment angecy or labor organization to grant preferential treatment to any individual or to any group because of the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information or ancesty of such individual or group because of imbalance which may exist between the total number or percentage of persons employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization or admitted to or employed in, any apprenticeship or other training program and the total number or percentage of person of such race,color, creed, national origin, sex, sexual orientation, which shall not include

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person whose sexual orientation involves minor children as the sex object, age, genetic information or ancestry in the commonwealth or in any community, section or other area therein, or in the available work force in the commonewealth or in any of its political subdivisions.

19. (a) It shall be unlawful discrimination for any employer, employer agency, labor organization, or licensing agency to

(1) refuse to hire or employ, represent, grant membership to, or license a person on the basis of that person's genetic information;

(2) collect, solicit, or require, disclousure of genetic information from any person as a condition of employment, or membership, or of obtaining a license;

(3) solicit submission to, require, or administer a genetic test to any person as a condition of employment, membership, or obtaining a license;

(4) offer a person an inducement to undergo a genetic test or otherwise disclose genetic information;

(5) question a person about their genetic information or genetic information concerning their family members , or inquire about previous genetic testing;

(6) use the results of a genetic test or other genetic information to affect the terms, conditions, compensation or privileges of a person's employment, representation, membership, or the ability to obtain a license;

(7) terminate or refuse to renew a person's employment, representation, membership. or licenese on the basis of a genetic test or other genetic information; or

(8) otherwise seek, receive, or maintain a genetic information for non-medical purposes.

(FN1) 42 U.S.C.A. S 2000a.

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MASSACHUSETTS GENERAL LAWS ANNOTATED
PART I. **ADMIMISTRATION OF THE GOVERNMENT**
TITLE XXI. **LABOR AND INDUSTRIES**
CHAPTER 151B. **UNLAWFULL DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGIOUS CREED, NATIONAL ORIGIN, ANCESRTY OR SEX**

S5. Complaints; procedure; limitations; bar to proceeding; award of damages

Any person claiming to be aggrieved by an alleged unlawful practice or alleged violation of clause (e) of section thirty-two of chapter one hundred and twenty-one B or sections ninety-two A , ninety-eight and ninety- eight A of chapter two hundred and seventy-two may, by himself or his attorney, make, sign and file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have comitted the unlawful practice complained of or the violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A which shall set forth the particulars thereof and contain such other information as may be required by the commission. The attorney general may, in like manner, sign and file such complaint. The commission, whenever it has reason to believe that any person has been or is engaging in an unlawfull practice or violation of said clause (e) of said section thirty-two or said section ninety-twoA, ninety-eight and ninety-eight A, may issue such a complaint. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this chapter, may file with the commission a verified complaint asking for assistance by conciliation or other remedial action.

After the filing of any complaint, the chairman of the commission shall designate one of the commissioners to make, with the assistance of the commission's staff, prompt investigation in connection therewith. If such commissioner shall determine after such investigation that no probable cause exists for crediting the allegations of the complaint, the commission shall, within ten days from such determination, cause to be issued and served upon the complainant written notice of such determination, and the said complainant or his attorney may, within ten days after such service, file with the commission a written request for a preliminary hearing before the commission to determine probable cause for crediting the allegations of the complaint, and the commission shall allow such request as a matter of right; provided, however, that such a preliminary hearing shall not be subject to the provisions of chapter thirty A. If such commissioner shall determine after such investigation or preliminary hearing that probable cause exists for crediting the allegations of a complaint relative to a housing practice, the commissioner shall immediately serve notice upon the complainant and respondent of their right to elect judical determination of the complaint as an alternative to determination in a hearing before the commission. If a complainant or respondent so notified wishes to elect such judicial determination, he shall do so in writing, within twenty days of receipt of the said notice. The person making such election shall give notice of such election to the commission and to all other complainants and respondents to whom the probable cause finding relates. The commission, upon receipt of such notice, shall dismiss the complaint pending before it without prejudice and the complainant shall be barred from subsequently bringing a complaint on the same matter before the commission. If any complainant or respondent elects judical determineation as aforesaid, the commisson shall authorzie, and not later than thirty days after the election is made the attorney general shall commence and maintain, a civil action on behalf of the complainant in the superior court for the country in which the unlawfull practice occurred. Any complainant may intervene as of right in said civil action. If the court in such civil action finds that a discriminatory housing practice has occurred or is about to occur, the court may grant any relief which a court could grant with respect to such discriminatory housing practice in a civil action under section nine. Any relief so granted that would accreu to an aggrieved person in a civil action commenced by that aggrieved person under said section nine shall also accrue to that apprieved person in a civil action under this section. If such commissioner shall determine after such investigation or preliminary hearing that probable cause exists for crediting the allegations of any complaint and no complainant or respondent has elected judical determination of the matter, he shall immediately endeavor to eliminate the unlawful practice complained of or the violation of said clause (e) of said section thirty or said sections ninety-two A, ninety-eight and ninety-eight A by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has occurred in the course of such endeavors, provided that the commission may publish the facts in the case of any

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compainnt which has been dismissed, and the terms of conciliation when the complaint has been so deposed of. In case of failure so to eliminate such practice or violation, or in advance thereof if in his judgment circumstances so warrant, he shall cause to be issued and served in the name of the commission, a written notice, together with a copy of such complaint as the same may have been amended, requiring the person, employer, labor orgainization or enployment agency named in such complaint, hereafter referred to as respondent, to answer the charges of such complaint at a hearing before the commission, at a time and place to be specified in such notice. The place of any such hearing shall be the office of the commission or such other place as may be designatied by it. Before or after a determination of probable cause hereunder such commissioner may also file a petition in equity in the superior court in any country in which the unlawfull practice which is the subject of the complaint of the complaint occurs, or in a country in which a respondent resides or transacts business, or in Suffolk county, seeking appropriate injusntive releif against such respondent, including orders or decrees restraining and enjoining him from selling, renting, or otherwise making unavailable to the complainant any housing accommodations or public accommodations with respect to which the complaint is made, pending the final determination of proceedings under this chapter. An affidative of such notice shall forthwith be filed in the clerk's office. The court shall have to power to grant such temporary releif or restraining orders as it deems just and proper. The case in support of the complainant shall be presented before the commission by one of its attorneys or agents or by an attorney retained by the complainant, and the commissioner who shall have previously made the investigation and caused the notice to be issued shall not participate in the hearing except as a witness, nor shall he participate in the diliberations of the commission in such case except when necessary to decide an appeal to the full commission; and the aforsaid endeavors at conciliation shall not be received in evidence. If an investigating commissioner determines that probable cause exists to credit the allegations of a complainant that a respondent has refused to sell, rent, or to negotiate in the sale, rental, or leasing of, housing accommodations or commercial space and if he determines that such respondent is a nonresidence of the commonwealth and cannot be personally served with process in the commonwealth, such investigating comissioner may file a petition in equity in the nature of an in rem proceeding seeking appropriate injunctive relief against such property with respect to which a complaint has been made , including orders or decrees restraining and enjoining any sale, rental, lease, or other disposition of such property which would render it unavailable to the complainant pending the final determination of proceedings under this chapter. Such commissioner shall send by registered mail, with a return receipt requested, a copy of such petition to the last address of such respondent known to the commissioner. An affidavit of compliance herewith, and the respondent's return receipt or other proof of actual notice, if received, shall be filed in the case on or before the return day of the process or within such further time as the court may allow. A copy of the order or decree of the court running against such property of a nonresident respondent shall be recorded in the registry of deeds in the county wherein such housing accommodations or commercial space is located, and a copy of such order or decree shall be attached in a conspicuous place to the property which has been the subject of a complaint under section four by the sheriff of the county wherein such property is located, or by his authorized agent or employee. Any person purchasing housing accommodations or commercial space, subsequent to the recording of the order or decree in the registry of deeds, shall be, as a matter of law, bound by the terms of any order which the commission has made or may make relating to such property which has been the subject of an order or decree of the superior court. Any person renting ot leasing housing accommodations or commercial space subsequent to the attachment of a copy of an order or decree referred to above by the sheriff of the county wherein such property is located or by his authorized agent or employee shall be, as a matter of law, bound by the terms of any order which the commission has made or may make relating to such property. The respondent may file a written verified answer to the complaint and appear at such hearing in person or otherwise, and submit testimony. In the discretion of the commission, the complainant may be allowed to intervene and present testimony in person or by counsel. The commission or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent shall have like power to amend his answer. The commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and be transcribed at the request of any party. If, upon all the evidence at the hearing the commission shall find that a respondent has engaged in any unlawful practice as defined in section four or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety eight and ninety-eight A, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful practice or violaton of said clause (e) of said section thirty-two or said sections ninety-two A, ninety eight and ninety eight A to take such affirmative action, including but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership in any respondent labor orginization, as, in the judgement of the commission, will effectuate the purpose of this chapter or of said labor organization, as, in the judgement of the commission, will effectuate the purpose fo this chapter or of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety- eight A, and including a

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requirement for report of the manner of compliance. Such case and desist orders and orders for the affirmative relief may be issued to operate prospectively. If , upon all the evidence, the commission shall find that a respondent has not engaged in ay such unlawful practice or violation of said clasuse (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, the commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said complaint as to such respondent. In addition to any such relief, the commission shall award reasonable attorney's fees and costs to any prevailing complaint. A copy of its order shall be delivered in all cases to the attorney general and such other public officers as the commission deems proper. The commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder. Any complaint filed pursant to this section must be so filed within 300 days after the alleged act of discrimination. The institution of proceedings under this section, or an order thereunder, shall not be a bar to proceedings under said section ninety-two A, ninety-eight and ninety-eight A, nor shall the institution of proceedings under said sections ninety-two A, ninety-eight and ninety-eight A, or a judgment thereunder be a bar to proceedings under this section.

If upon all the evidence at any such hearing the commission shall find that a respondent has engaged in any such unlawful pratice relative to housing or real estate or violated clause (e) of said section thirty-two it may, in addition to any other action which it may take under this section, award the petitioner damages, which damages shall include, but shall not be limited to, the expenses incurred by the petitioner for obtaining alternatice housing or space , for storage of goods and effects, for moving and for other costs actually incurred by him as a result of such unlwaful practice or violation. Any person claiming to be aggieved by such an award of damages may, notwithstanding the provisions of section six and within ten days of notice of such award, bring a petition in the municpal court of the city of Boston or in the district court within the judicial district of which the respondent resides, addressed to the justice of the court, praying that the action of the commission in awarding damages be reviewed by the court. After such notice to the parties as the court deems necessary, it shall hear witnesses, review such action, and determine whether or not upon all the evidence such an award was justified and thereafter affirm, modify, or reverse the order of the commission. The decision of the court shall be final and conclusive upon all the parties as to all matters of fact.

If, upon all the evidence at any such hearing, the commission shall find that a respondent has engaged in any such unlawful practice, it may in addition to any other action which it may take under this section, assess a civil penalty agains the respondent:
(a) in an amount not to exceed $10,000 if the respondent has not been adjudged to have committed any prior discriminatory practice;

(b) in an amount not to exceed $25,000 if the respondent has-been adjudged to have committed one other discriminatory practice during the 5-year period ending on the date of the filing of the complaint, and

(c) in an amount not to exceed $50,000 if the respodent has bee adjudged to have committed 2 or more discriminatory practices during the 7-year period ending on the date of the filing of the complaint. Notwhithstanding the aforesaid provisions, if the acts constituting the discriminatory practice that is the object of the complaint are committed by the same natural person who has been previously adjudged to have committed acts constituting a discriminatory practice, then the civil penalties set forth in clauses (b) and (c) may be imposed without regard to the period of time within which any subsequent discriminatory practice occurred.

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MASSACHSETTES GENERAL LAWS ANNOTATED
PART I. **ADMINISTRATION OF THE GOVERNMENT**
TITLE XXI. **LABOR AND INDUSTRIES**
CHAPTER 151B. **UNLAWFUL DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGIOUS CREED, NATIONAL ORIGIN, ANCESTRY, OR SEX**

=> S9. Construction and enforcement of chapter; inconsistent laws; excluxiveness of statutory procedure; civil remedies; speedy trial; attorney's fees and costs; damages

<[First paragraph applicable to claims pending on and arising after November 5, 2002. See 2002, 223, Sec.4]>

This chapter shall be construed liberally for the accomplishment of it pirpose and any law inconsistent with any provision of this chapter shall not apply, but nothing contained in this chapter shall be deemed to repeal any provision of any other law of this commonwealth relating to discrimination; but, as to acts declared unlawful by section 4, the administrative procedure provided in this chapter under section five shall, while pending, be exclusive; and the final determination on the merits shall exclude any other civil action, based on the same grievance of the individual concerned.

Any person claiming to be aggrieved by a practice made unlawful under this chapter or under chapter one hundred and fifty-one C, or by any other unlawful practice within the jurisdiction of the commission, may, at the expiration of ninety days after the filing or a complaint with the commission, or sooner if a commissioner assents in writing, but not later than three years after the alleged unlawful practice occurred, bring a civil action for damages or injuctive relief or both in the superior or probate court for the country in which the alleged unlawful practice occurred or in the housing court within whose district the alleged unlawful practice occurred if the unlawful practice involves residential housing. The petitioner shall norify the commission of the filing of the action , and any complaint before the commission shall then be dismissed without prejudice, and the petitioner shall be barred from subsequently bringing a complaint on the same matter before the commission. Any person claiming to be aggrieved by an unlawful practice relative to housing under this chapter, but who has not filed a complaint pursuant to section five, may commence a civil action in the superior or probate court for the country in which the alleged unlawful practice occurred or in the housing court within whose district the alleged unlwaful practice occurred; provided, however, that such action shall not be commenced later than one year after the alleged unlawful practice has occurred. An aggrieved person may also seek temporary injunctive relief in the superior, housing or probate court within such country at any time to prevent irreparable injury during the pendency of or prior to the filing of a complaint with the commission.

An action filed pursiant to this section shall be advanced for a speedy trial at the request of the petitioner. If the court finds for the petitioner, it may award the petitioner actual and punitive damges. If the court finds for the petitioner it shall, in addition to any other relief and irrespective of the amount incontroversy, award the petitioner reasonable attorney's fees and costs unless special circumstances would render such award unjust. the commission shall upon the filing of any complaint with it, notify the aggrieved person of his rights under this section.

Any person claiming to be aggrieved by a practice concerning age discrimination in employment made unlawful by section four may bring a civil action under this section for damages or injunctive relief, or both, and shall be entitled to a trial by jury on any issue of fact in an action for damages regardless of whether equitable relief is sought by a party in such action. If the court finds for the petitioner, recovery shall be in the amount of actual damages; or up to three, but not less than two, times such amount if the court finds that the act or practice complained of was committed with knowledge or reason to know that such act or pratice violated the provisions of said section four. The prorovisions set forth in the first, second and third paragraphs shall be applicable to such complaint or action to the extent that such provisions do not conflict with the provisions set forth in this paragraph.

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MASSACHUSETTS GENERAL LAW ANNOTATED
PART I. **ADMINISTRATION OF THE GOVERNMENT**
TITLE XXI. **LABOR AND INDUSTRIES**
CHAPTER 151C. **FAIR EDUCATION PRACTICES**

=>S 2. Unfair practices

It shall be an unfair educational practice for an educational institution:--

(a) To exclude or limit or ortherwise discriminate against any United States citizen or citizens seeking admission as student to such institution because of race, religion, creed color, or national origin.

(b) To penalize any of its employees or students or any applicant because he has testified, participated or assisted in any proceeding under this section.

(c) To cause to be made any written or oral inquiry concerning the race, religion, color or national origin of a person seeking admission, except that a religious or denominational educational institution which certified to the commission that it is a religious or denominational educational institution may require as to the religious or denominational affiliations of applicants for admission.

(d) To exclude, limit or otherwise discriminate against any person seeking admission to a program or course of study leading to a degree, beyond a bachelor's degree, because of race, religion, creed, color, age, sex, or national origin, or to so discriminate against any student to such program or course or study in providing benefits, privileges and placement services.

(e) To exclude from admission any student because said student is blind,or deaf or require the use of a dog guide.

(f) To request any information, to make or keep a record of such information, to use any form of application or application blank which requests infromation or to exclude or limit or ortherwise discriminate against any person by reason of his or her failure to furnish information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention or disposition regarding any violation of the law in which no conviction resulted or in which a conviction has bee vacated, or (ii) a first conviction for any of the following misdemeanors: drunkness, simple assault, minor traffic violations, affray or disturbance of the peace, or (iii) any conviction of a misdemeanor where such conviction occurred more than five years prior to the date of such application or admission, unless the applicant was sentenced to imprisonment unpon conviction of such misdemeanor, or such individual has been convicted of any offense within the five years' period.

(g) To sexually harass students in any program or course of study in any educational institution.

This section is not intended to limit or prevent an educational institution from using any criteria other than race, religion, creed, sex, color or national origin in admission of students

Current through Ch. 34 of the 2005 1st Annual Sess.

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No. 2004-P-1653

LUYEN HUU NGUYEN,BUI DIEM,
DINH TU NGUYEN, SANG P. LE.
BATUONG NGUYEN, XUAN M. TRAN, NAM NHAT PHAN
LIEM THANH NGUYEN, and CHUC V. NGUYEN

Plaintiffs - Appellants.
u.

WILLAIM JOINER CENTER FOR THE STUDY OF
WAR AND SOCIAL CONSEQUENCES AND THE
UNIVERSITY OF MASSACHUSETTS, BOSTON

Defendant - Appellee.

On appeal from a judgement of the Suffolk Superior Court

BRIEF FOR APPELLEE

THE END