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PROVING "BUT FOR" CAUSATION AFTER NASSAR, WHEN THE EMPLOYER HAS MANIPULATED THE SELECTION PROCESS

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Employment discrimination takes place during every step of the hiring process. Racial and gender bias does not arise solely at the final decision between the two top qualified candidates. It can arise at any stage leading up to that moment. It can arise when a job description is drafted to favor a pre-selected candidate. It can arise with the timing of the job advertisement, the adoption of "minimum" selection criteria, or the scheduling of interviews. It can arise with the appointment of the search committee, the interview committee or the hiring committee. Bias can arise when deadlines are extended, or when decisions are simply deferred until a later time. The point is that there are many steps taken in the hiring process before a final selection is made, and each of those steps may be the moment when fair employment standards fail.

When discriminatory or retaliatory animus arises during one of these interim steps (and not at the final step), it can be difficult to prove that the discrimination was the "but for" cause of an eventual rejection. One type of analysis, called "a motivating factor" analysis, permits a finding of liability, upon proof that an unlawful motive was a factor in the hiring process, even if that motive did not make a difference in the ultimate employment decision. The "motivating factor" analysis is applicable to cases such as race or gender discrimination under Title VII, and is codified at 42 U.S.C. § 2000e-2(m).

However, in University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013), the Supreme Court held that the "motivating factor" analysis does not apply to Title VII retaliation claims. As such, a plaintiff must demonstrate that she was harmed because of retaliatory animus, in order to prevail. Proof of retaliatory bias is insufficient to establish liability, absent evidence that the ultimate rejection would not have occurred "but for" that bias. The demise of the "motivating factor" theory, as applied to retaliation, becomes problematic for cases involving manipulation of selection criteria. This article will suggest how to advocate in favor of an expanded definition of "but for" causation, and to broaden the concept of adverse action, in order to mitigate against the negative effects of Nassar.

A. THE "MOTIVATING FACTOR" THEORY IS A POTENT TOOL FOR DISCRIMINATORY ANIMUS APPEARING EARLY IN THE SELECTION PROCESS

Under Title VII, claims of race, religion, national origin and sex discrimination benefit from what is called the "motivating factor" analysis. 42 U.S.C. § 2000e-2(m). Under Section 2(m), "An unlawful employment practice is established when the complaining party demonstrates that . . . [a protected attribute] . . . was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). Liability under this section obtains even if an employer demonstrates the respondent would have taken the same action in the absence of the impermissible motivating factor. 42 U.S.C. § 2000e-5(g)(2)(B).

The legislative purpose behind enacting 42 U.S.C. § 2000e-2(m), is to eliminate from the employment setting any consideration at all of an illegal motive, and provide relief even if such consideration did not make a difference in the final employment decision. Estate of Reynolds v. Martin, 985 F.2d 470, 475 (9th Cir. 1993), reh. denied 994 F.2d 690 (1993). Thus, for example, proof that gender was considered in a decision is sufficient to establish liability, even if such consideration did not affect the ultimate job action. Hannon v. Chater, 887 F. Supp. 1303, 1316 (N.D. 1995). A prevailing plaintiff asserting this theory may seek declaratory judgment, limited injunctive relief, and attorney's fees and costs, but may not recover lost pay, or emotional distress damages. 42 U.S.C. § 2000e-5(g)(2)(B). Nevertheless, the motivating factor analysis is a powerful tool to address and remedy unlawful bias, wherever it may appear.

One benefit of the "motivating factor" analysis is that it permits a plaintiff to address and impose liability for the presence of impermissible bias at a preliminary stage of an employment decision, for example, at the job posting stage or at the interview stage. A plaintiff may win such a case, even if she cannot

prove that she would have received the job, but for her protected class status. A plaintiff, under such circumstances, may obtain injunctive relief, to prevent similar discriminatory conduct from arising in the future, against herself or others.

B. NASSAR REJECTS THE "MOTIVATING FACTOR" STANDARD IN TITLE VII RETALIATION CASES, AND IMPOSES THE "BUT FOR" STANDARD

In University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013), the Supreme Court rejected the "motivating factor" analysis for Title VII retaliation claims. Under Nassar, the plaintiff must show a causal connection between an unlawful motive, and the ultimate injury. In other words, the plaintiff must show that the prohibited criterion was the "but-for" cause of harm.

In one sense, Nassar does nothing more than re-establish the familiar causation burden that employment lawyers generally administer. However, one of the negative effects of Nassar is to diminish the tools for addressing retaliation that arises at an early stage of the selection process, where it is more difficult to show that early or subtle bias ultimately caused the rejection.

One way to mitigate the adverse effect of Nassar is to advocate in favor of a broad doctrine of causation, that permits a fact finder to find that early stage discrimination had a direct, but-for effect on the final decision. The goal of this paper is to assist plaintiff-side employment lawyers with this advocacy.

C. SELECTION MANIPULATION MAKES CAUSATION SEEM ELUSIVE

Discrimination during the selection process is a special challenge to the Plaintiff-side employment lawyer, because the process can because it can make the route to establishing causation seem impenetrable. For example, assume that a company employs a member of a minority, but does not want to see that member promoted to a more visible position, for which she is very qualified. Assume further that the company intentionally posts the position while the employee is on a three month leave. There may now be some difficulty in proving that the employee has been the victim of discrimination. First, the employee is not even able to show that she has applied for the position. Second, the company probably has no written criteria concerning when it must post positions, so it is not easy to prove that the company has engaged in manipulation. Third, the manager who decides when to schedule the posting may, in fact, be a different person than the one who makes the final hiring decision. Therefore, the employer may be able to prevail in its assertion that early stage bias was not the but for cause of the rejection.

D. THE FIRST CURE: EXPAND THE CAUSATION STANDARD TO REFLECT THE ENORMOUS IMPACT THAT EARLY STAGE CONDUCT HAS, USING MILLER-EL AND OTHER CASES THAT ACKNOWLEDGE HOW THE REAL WORLD WORKS

The but for standard may be interpreted in a very broad fashion, to address causes that on first blush may be a minor occurrence, but which ultimately may be linked to harm. The but for approach embraces a situation where a discriminatory act was the "straw that broke the camel's back." Burrage v. United States, 134 S. Ct. 881, 888 (2014).

The case of Miller-El v. Dretke, 125 S. Ct. 2317 (2005), involving allegations of discriminatory jury selection, represents one of the best illustrations of selection manipulation. In that case, a criminal defendant alleged that a prosecutor violated the Constitutional right to Equal Protection, by acting in a way that would result in the exclusion of African-Americans from a jury. Miller-El, 125 S. Ct. at 2323. Under the system in operation, jurors were assigned an arbitrary number, and would be questioned, and seated, in numerical order. However, the parties had the right to periodically "shuffle" the jurors. Id. at 2332-2333. In Miller-El, the prosecutor would shuffle the jury when African-Americans were "predominant" among those next in line. Id. at 2333. The Supreme Court held that the prosecutors' practice of "shuffling" the jury when African-Americans were disproportionately seated at the front of the venire demonstrated discrimination. Id. at 2332-2333.

Miller-El provides three important lessons relevant to selection manipulation. First, it is possible to engage in discrimination simply by exercising judgment calls within the discretion of decision-makers. Second, it is possible to engage in discriminatory conduct prior to what is ordinarily thought of as the final decision stage. In other words, the prosecutor was able to exclude African-Americans through altering the order of consideration, and even before using a peremptory challenge and making actual selection decisions.

The third and most potent lesson with respect to selection manipulation is that while the discriminatory prosecutor could not guarantee that a reshuffling would result in less African-Americans at the front of the venire, a reshuffling would necessarily reduce the odds of a grouping of African-Americans at the front of the queue. In other words, the prosecutor's strategy was understood as discriminatory, even though its use could not guarantee an exclusion of African Americans, and in some scenarios could even increase their representation. Rather, an illegal motive was present, when the decision merely increased the odds of a predominately white jury.

The Miller-El case provides a great example of discriminatory motives, employed at an early stage in the selection process, which is ultimately shown to yield discriminatory results. The case provides, by analogy, a path for success, even under the causation standards established in Nassar.

Plaintiffs should cite liberally to cases that comprehend the real-world impact of bias infecting the early stages of a decision. "[A] plaintiff in a . . . discrimination case need not prove intentional discrimination at every stage of the decisionmaking process; impermissible bias at any point may be sufficient to sustain liability." Lam v. University of Hawaii, 40 F.3d 1551, 1560-1561 (9th Cir. 1994). That is because discrimination at any stage may infect the ultimate employment decision. Id.; Dunlap v. Tennessee Valley Authority, 519 F.3d 626, 632 (6th Cir. 2008) (where the plaintiff would have not received an adequate ranking even if improprieties in the selection process were corrected, the plaintiff may still prevail on his discrimination claim, because the improprieties show that the screening process in general was skewed); see Cones v. Shalala, 199 F.3d 512, 521 (D.C. Cir. 2000) ("refusing to allow [an employee] to compete for [a] promotion is tantamount to refusing to promote him")

While selection manipulation is common, the Courts have failed to develop an overall theory to describe the phenomenon, or establish universal principles. The decisions are truly made on a case-by-case basis, with opinions generally failing to cite to others. Consequently, the state of the law has failed to mature, because the decisions do not build upon each other. With few overarching principles to cite, the best an employment lawyer can do is to cite cases with analogous fact patterns. With that in mind, this article will assemble a variety of cases dealing with selection manipulation at various stages.

Acting Position: Hunt v. MWRA, C.A. No. 01-2796 C , Suffolk ss., (age discrimination jury verdict for plaintiff, where employer placed a junior, less qualified person in an acting position, and then later hired that person in light of his superior experience for a supervisory position, and rejected older, more senior employee for the promotion); Casamento v. MBTA, 559 F. Supp. 2d 110, 116 (D. Mass. 2008) (recognizing the possibility of a claim where the employer rescinds a job posting, but permits another employee to informally fill that position, but granting summary judgment in the instant case, based on lack of evidence of discrimination), affirmed 550 F.3d 163, 165 (1st Cir. 2008). MCAD and Dalrymple v. Winthrop, Decision of the Hearing Officer, MCAD Docket No. 02-BEM03751, Waxman, Hearing Officer, January 22, 2014, at 27-29 (city gave male comparator an acting promotion, and access to command school, instead of the equally ranked female candidate with far greater seniority, which "paved the way" for the promotion of the male comparator); Rogers v. Department of the Navy,

01830484, 1176/D8 (1984); McKithan v. Secretary of Interior, 01950123 (1998); Dufauchaud v. USPS, 0861952, 1478/E11 (1986); Nelson v. Department of Navy, 01820825, 1024/D10 (1983). In Mickiewicz v. Boston, 31 Mass. L. Rptr. No. 20, 448 (November 18, 2013), the employer placed a less qualified person in a temporary position, and then later promoted that person based on the direct experience the person had in that position. In this case, the employer's conduct was not considered evidence of discrimination.

Application Rejection: Passing over the job application of a member of the protected class is the sort of evidence that has given rise to an inference of unlawful discrimination. Johansen v. NCR Comten, 30 Mass. App. 294, 298 (1991).

Cancelling Hiring Process: Cancelling the hiring process to avoid hiring the plaintiff. Pierce v. President and Fellows of Harvard College, 2014 U.S. Dist. Lexis 3728 (D. Mass.), at 10 n.7.

Cat's Paw Theory/Innocent Decisionmaker: In general, if a supervisor performs an act motivated by animus that is intended by the supervisor to cause an adverse employment action, and that act is a proximate cause of the employment action, then the employer is liable. Mole v. University of Massachusetts, 442 Mass. 582, 598-600 (2004). In this situation, an employer is liable for the actions of an innocent decisionmaker, unless the decisionmaker's investigation reveals a completely independent reason for discharge, or where the investigation finds that the termination was justified on a basis apart from the supervisor's recommendation. Staub v. Proctor Hospital, 131 S. Ct. 1186 (2011) (where independent decisionmaker reviews personnel file). Where the independent decisionmaker relies on, or consults with, the discriminatory supervisors, then liability may attach. Verdrager v. Mintz,Levin, Cohn, Ferris, Glovsky & Popeo, ___ Mass.___ (2016).

A First Circuit decision stands for the proposition that an employer is liable where a discriminatory supervisor provided management with a truthful report about the employee, which led to the employee's termination. Tejada-Batista v. Morales, 424 F.3d 97, 102-103 (1st Cir. 2005) (a supervisor recommended the termination of an employee, based on criminal conviction occurring three years before, but despite the truth of the assertion, a jury was free to find that the supervisor would not have raised this concern but for retaliatory motive). In other words, even when just cause exists for a termination, that cause may not have been the actual motive. Heffernan v. Paterson, 136 S. Ct. 1412, 1419 (2016) (where a neutral policy would have warranted the employee's termination, it is nevertheless up to the trial court to determine whether that policy was the reason that the adverse action took

place); Chase v. United States Postal Service, 2013 U.S. Dist. Lexis 157592 (D. Mass.), at 42 n.14.

When the employer makes a choice between legitimate criteria, but does so in a way to orchestrate the termination of disfavored individuals, that is addressed by the discrimination laws. In Hodgens v. General Dynamics Corp., 144 F.3d 151, 167 (1st Cir. 1998), the court acknowledged that in administering a layoff, an employer could choose to make layoff decisions based on seniority or quality of performance, and noting that this decision is made unilaterally by the employer, but that such decisions among legitimate criteria are not immunized from discrimination law. Id. ("Because of the availability of seemingly neutral rationales under which an employer can hide its discriminatory intent, and because of the difficulty of accurately determining whether an employer's motive is legitimate or a pretext for discrimination, there is reason to be concerned about the possibility that an employer could manipulate its decisions to purge employees it wanted to eliminate").

Changing Criteria or Procedures: Fisher v. Orange, 2012 U.S. Dist. Lexis 23488 (D. Mass.), at 3, 9-13 (implementing an "independent application assessment procedure" which it had never adopted before, in an attempt to derail a female applicant's chances for a firefighter position); Handrahan v. Red Roof Inns, Inc., 43 Mass. App. 13, 18 (1997) (employer implemented a new company policy, requiring that housekeepers clean at least one room every thirty minutes, only after learning of the plaintiff's handicap); Fernandez v. Attleboro Housing Authority, Memorandum of Decision, C.A. No. 2009-01570, Bristol, ss., Kane, J., August 1, 2012, at 14-15, aff'd 470 Mass. 117 (2014) (switch to seniority based lay off policy after the employer learned about complaint of least senior employee); Sobocinski v. United Parcel Service, MCAD Docket No. 05-SEM-00849, Nov. 30, 2009, Hearing Officer Kaplan, at 17-18 (generating new qualification test for the complainant alone); McLaughlin v. City of Lowell, Memorandum of Decision and Order on Defendant's Motion for Amended Judgment, C.A. 04-02143-L2, Middlesex, ss., Wilkins, J., April 28, 2011, at 3-4 (employer's adoption of rule against inhalers is illegal, where rule was propounded for discriminatory reasons, even if Regional Medical Panel (PERAC) relied on that rule as a qualification standard – the rule caused the rejection). See "Presumption" in this Index.

Committee Stacking: Stacking a review committee tasked with investigating complaints against the plaintiff, with people who are already hostile to the plaintiff. See Sabinson v. Trustees of Dartmouth College, 542 F.3d 1, 4 (1st Cir. 2008) (even if the committee was unfair, discrimination was not established). In Bulwer v. Mount Auburn Hospital, 473 Mass. 672, 687-688 (2016), the Court found pretext based in part on the fact that a review committee was not constituted

in conformity with the employer's policy, and that plaintiff was not permitted to attend committee meetings or review materials relating to those meetings.

Delay in Filling Position: Simas v. First Citizens' Federal Credit Union, 170 F.3d 37, 51 n. 10 (1st Cir. 1999) (where employer failed to fill a position to which the plaintiff applied, the district court erred in holding that the failure to hire the plaintiff could not have been retaliatory); Flipp v. Town of Rockland, 613 F. Supp. 2d 141, 143, 147 (D. Mass. 2009) (refusing to fill position after the plaintiff was found qualified for it); Hurley v. Melrose, 27 MDLR 7 (2005) (city refused to fill sergeant positions for over a year, allowing the civil service promotion list to lapse, to permit younger officers to have a greater chance for promotion); MCAD and Dalrymple v. Winthrop, Decision of the Hearing Officer, MCAD Docket No. 02-BEM03751, Waxman, Hearing Officer, January 22, 2014, at 23-24, 32 & nn.10, 14 (city failed to make any promotions to sergeant during periods in which complainant was at the top of the eligible list); Davidson v. Pittsfield, 2014 Mass. App. Unpub. Lexis 100, at 9 n.4 (position held open for a year while younger replacement took accreditation classes paid for by the employer, and was expressly groomed for the position).

Document Manipulation: A 2010 amendment to personnel records law, Mass. Gen. Law c. 149, § 52C, requires employers to provide employees notice whenever a document has been retained which has been used, or may be used, to negatively affect employment opportunities or disciplinary record. The failure to comply with this law may give the employee a basis for excluding the document, or questioning whether it was contemporaneously created.

Due Process Violations: An employer that denies an employee notice of the charges against him, fails to provide information concerning the employee's alleged wrongdoing, considers information presented at meetings to which the employee was not invited, fails to constitute a review panel as required by its own policies, and denies remediation opportunities accorded to others, has established a pretextual process. Bulwer, 473 Mass. 687-688.

Engineering Crisis Which Causes the Termination: Fire Chief engineered a financial crisis by not telling voters that the budget was inadequate, thereby requiring the lay-off of a number of disfavored employees due to the ensuing crisis. The layoff process was tainted, even if other decisionmakers were innocent of this manipulation. Raymond v. Civil Service Commission, 25 Mass. L. Rptr. No. 17, 322 (May 18, 2008).

Examination Manipulation: Where City withdrew promotion examination for firefighters upon seeing the racial make-up of those who scored well, this was discriminatory conduct. Ricci v. Destefano, 129 S. Ct. 2658, 2664 (2009).

Evaluations: Thomas v. Eastman Kodak Co., 183 F.3d 38, 52, 58-9 (1st Cir. 1999) (where a poor evaluation is based on race, subsequent actions by innocent decisionmakers based on that evaluation are discriminatory).

Grooming Preferred Candidate for the Position: See "Acting Position" in this Index.

Hiding Open Position: Buckley Nursing Home, Inc. v. MCAD, 20 Mass. App. 172, 176 (1985) (where African-American applicant was falsely told by non-supervisory employees that employment position was not open, this evidence supported inference of discriminatory failure to hire)

Interview manipulation: Mercer v. PriceWaterhouseCoopers LLP, Memorandum of Decision and Order on Defendant's Motion for Summary Judgment, C.A. No. 04-1716, Suffolk, ss., Botsford, J., February 22, 2006 (the plaintiff applied for positions, but was never interviewed; but the Plaintiff's fiancée applied for the same positions using a fictitious resume that was modeled on the Plaintiff's qualifications, and she was soon contacted for an interview); Dunlap v. Tennessee Valley Authority, 519 F.3d 626, 632 (6th Cir. 2008) (subjective interview scoring, resulting in worse scores for more qualified applicant, and varied scoring even on relatively objective criteria such as attendance and safety record, and use of "score-balancing" to even out differences in scores, evidenced manipulation of the selection process, which further demonstrated pretext. Moreover, the interviewers ranked ten people "outstanding" which is the same amount of job openings); Hilde v. Eveleth, 777 F.3d 998, 1007-1008 (8th Cir. 2015) (manipulated scoring of interviews calls into question the objectivity of the entire hiring process); Mailloux v. Littleton, 473 F. Supp. 2d 177, 182 (D. Mass. 2007) (where hiring committee initially refuses to interview plaintiff, and then, after the delayed interview, refuses to pass his name on to the final decision-maker, but passes along the names of other, much less qualified individuals); Riffelmacher v. Board of Police Commissioners of Springfield, 27 Mass. App. 159, 162-164 (1989) (interview process was unstructured and subjective, with female applicant being asked questions about her family life and stereotypical concerns raised about being able to cope in the position. Males' experience was listed as a positive factor, but the plaintiff's experience was not listed. Boilerplate positive language was used for males' evaluations, compared with detailed and negative language describing females. Negative factors for the females, such as record of discipline, and moving from job to job, did not disqualify males); Wennik v. PolyGram Group Distrib., 304 F.3d 123, 131 (1st Cir. 2002) (of the five field marketing positions that the employer was filling, it required an interview for the position for which the plaintiff applied, and slotted in hirees for the other positions without interviews); McSweeney v. Trial Court of Massachusetts, Decision of the Hearing

Officer, MCAD Docket No. 07-BEM-01947, Judith Kaplan, August 11, 2011, at 33, 35, 38 (adding an extra level of interviews when female was recommended for hire). But see Zaniboni v. Massachusetts Trial Court, 2012 Mass. App. Lexis 75 (the plaintiff was promoted, but a rejected applicant grieved denial of promotion, and the employer correctly re-interviewed the top candidates and awarded the job to the other applicant).

Investigation Issues: Lattimore v. Polaroid Corp., 99 F.3d 456, 467 (1st Cir. 1996) (plaintiff was fired before a full investigation of all relevant information, demonstrating that the decision was "preordained"); Monteiro v. City of Cambridge, C.A. No. 2001-02737, Memorandum of Decision and Order on the Defendant's Motion for Judgment Notwithstanding the Verdict; Motion for a New Trial, or, in the Alternative, Remittitur; Motion to Strike Plaintiff's Memorandum in Response to Defendant's Post-Trial Submission; and Motion to Supplement Record on Appeal, Middlesex, ss., April 24, 2009,at 21 (embarking on a secret investigation, depriving the employee of the opportunity to respond to complaints like other employees were given).

Job Description: Rossy v. Roche Products, Inc., 880 F.2d 621, 625-626 (1st Cir. 1989) (diluting job requirements to render qualified a favored male can support an inference of sex discrimination); Gu v. Boston Police Dept., 312 F.3d 6, 12-13 n.4 (1st Cir. 2002) (tailoring job qualifications to exclude an otherwise qualified female could constitute discrimination).

Job Titles: Andujar v. Nortel Networks, Inc., 400 F. Supp. 2d 306, 332 (D. Mass. 2005) (evidence that job titles were fabricated to justify pay raises for Caucasian employees is evidence of discriminatory intent).

Post Hoc Efforts to Change Rules for Selecting Candidates: Ricci v. Destefano, 129 S. Ct. 2658 (2009) (post hoc use of "banding," which involves rounding examination scores or gathering scores in the same range, and treating them as the same score, would be impermissible if it was implemented after an otherwise valid test, for the purpose of achieving racial balance); Connecticut v. Teal, 102 S. Ct. 2525 (1982) (hiring racially balanced workforce using voluntary affirmative action program does not preclude liability for earlier use of discriminatory promotional examination that wrongfully excluded certain African-American employees from consideration).

Posting is Avoided: Conway v. Electro Switch Corp., 825 F.2d 593, 599 (1st Cir. 1987) (employer's failure to comply with its prior custom of posting vacancies, and offer of positions directly to two males, supports finding of gender discrimination); Andujar v. Nortel Networks, Inc., 400 F. Supp. 2d 306 (D. Mass. 2005) (failure to post jobs); Harrison v. Boston Fin. Data Servs., Inc., 37 Mass.

App. 133, 138-139 (1994) (Plaintiff was not made aware of a particular job opening, and employers practices with respect to notice of job openings was informal and subjective).

Posting is Rescinded: Casamento v. MBTA, 559 F. Supp. 2d 110, 116 (D. Mass. 2008) (recognizing the possibility of a claim where the employer rescinds a job posting, but permits another employee to informally fill that position, but granting summary judgment in the instant case, based on lack of evidence of discrimination), affirmed 550 F.3d 163, 165 (1st Cir. 2008); Mercer v. PriceWaterhouseCoopers LLP, Memorandum of Decision and Order on Defendant's Motion for Summary Judgment, C.A. No. 04-1716, Suffolk, ss., Botsford, J., February 22, 2006 (soon after filing an MCAD charge, the Plaintiff applied for various positions with the employer, and was rejected each time. The positions that the Plaintiff applied for tended to disappear from the employer's website, and then get reposted elsewhere or later).

Pre-Selected Candidate: Is evidence of pretext. Pierce v. President and Fellows of Harvard College, 2014 U.S. Dist. Lexis 3728 (D. Mass.), at 116-7 (promise of promotion to other individual).

Sabotage of Qualification Process: McLaughlin v. City of Lowell, Memorandum of Decision and Order on Defendant's Motion for Amended Judgment, C.A. 04-02143-L2, Middlesex, ss., Wilkins, J., April 28, 2011, at 3-4 (employer's adoption of rule against inhalers is illegal, where rule was propounded for discriminatory reasons, even if Regional Medical Panel (PERAC) relied on that rule as a qualification standard – the rule caused the rejection); MCAD & Dietz v. Beverly Hospital, Decision of the Hearing Officer, MCAD Docket No. 04BEM01853, Kaplan (August 7, 2009), at 19 (employer failed to schedule the employee for a fitness assessment, and such an assessment was a prerequisite to re-hiring, employer thus rejected the employee, despite the employee's failure to apply for positions). Where disability retiree's reinstatement depended upon approval by department head and a Regional Medical Panel, and the department head refused to approve the reinstatement, the Regional Medical Panel never met. Since the department prevented the Panel from meeting, the failure of that panel to approve the reinstatement does not demonstrate lack of qualification. Hull v. MCAD, 72 Mass. App. 525 (2008).

Same Actor Inference: An employer may attempt to assert that the decision-maker that hired the employee is the same one that fired her, thus asserting an inference that the decision-maker could not have been discriminatory. This may be a potent inference at trial, but it is not one that can be used as summary judgment. Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, ___ Mass. ___ n. 32 (2016). Moreover, an employer's false identifications of individuals alleged to be

responsible for personnel decisions amounts to pretext which supports a finding of discrimination. Billings v. Town of Grafton, 515 F.3d 39, 56 (1st Cir. 2008); Zades v. Lowe's Home Centers, Inc., 446 F. Supp. 2d 29, 44 (D. Mass. 2006).

Subjective Decisionmaking: Undisciplined system of allowing local managers to assign territories to sales personnel, based on subjective factors, may lead to racially discriminatory practices. Turnley v. Banc of America Investment Services, Inc., 576 F. Supp. 2d 204, 213 (D. Mass. 2008)

Subjective Evaluations of Qualifications: When evaluating applicants for a position, taking every presumption against the plaintiff, while according every benefit of the doubt to others, demonstrates discrimination. Sun & MCAD v. University of Massachusetts, Dartmouth, MCAD Docket No. 05BEM00783, Waxman, Hearing Officer, June 1, 2011, at 34-37 (promotion process where the plaintiff's application was considered flawed, but similar applications with similar features were approved without criticisms, is discriminatory).

Timing of Selection Process: See Morales-Tanon v. Puerto Rico Electric Power Authority, 524 F.3d 15, 19 (1st Cir. 2008) (refusal to open selection process where it is obvious that the plaintiff is the most qualified candidate at the time, is not an adverse action)

E. THE SECOND CURE: ADVOCATE FOR EXPANSION OF WHAT IS REGARDED AS ADVERSE ACTIONS

Plaintiffs should consider addressing selection manipulation by attempting to expand the definition of an adverse action. In other words, unfair treatment in preliminary stages of the hiring process, may in themselves constitute an adverse action, separate from the ultimate failure to hire claim.

The standard for an adverse action for Title VII retaliation claims is plaintiff-friendly. The Supreme Court has held that a job action is materially adverse if it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Burlington Northern and Santa Fe Railway Co. v. White, 126 S. Ct. 2405, 2415 (2006). Consequently, the Nassar holding might be mitigated, in the context of selection manipulation, by demonstrating that each stage along the way, in which retaliation manifested itself, represents an independent adverse action.

So, for example, where a candidate for promotion is denied training that would support the promotion, dual claims should be brought for the denial of training, and the denial of promotion. See Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 201-202 (1st Cir. 1987); Rennie v. United Parcel Service, 139 F. Supp. 2d 159, 170 (D. Mass. 2001) (denial of interpreter that would have permitted the employee to be trained); 42 U.S.C. § 2000e-2(d); but see Morales-Vallellanes v. Potter, 605 F.3d 27, 39 (1st Cir. 2010) (where employer altered the schedule of a job posting, soon after the employee complained about discrimination, in an effort to dissuade the employee from applying, this is not an adverse action).

Delays that ultimately interfere with the final hiring decision can in and of themselves be adverse. Agusty-Reyes v. Dept. of Education of the Commonwealth of Puerto Rico, 601 F.3d 45, 54 (1st Cir. 2010) (a delayed and dismal evaluation that delayed the award of tenure is a tangible action); Fisher v. Orange, 2012 U.S. Dist. Lexis 23488 (D. Mass.), at 3, 9-13 (delay in hiring while employer sought to manipulate events to prevent plaintiff's hire).

Negative job evaluations, criticisms and warnings case be considered adverse. O'Brien v. Massachusetts Institute of Technology, 82 Mass. App. 905, 2012 Mass. App. Lexis 252, 12-13 (verbal and written warnings leading to a termination are adverse actions); Bray v. Community Newspaper Co., 67 Mass. App. 42, 44-5 (2006) (unfounded written warning accusing the plaintiff of unprofessionalism on the telephone, and for mismanaging her sales territory); Ritchie v. Department of State Police, 60 Mass. App. 655, 665 (2004) (false reprimands and evaluations are adverse actions for purposes of a Rule 12 motion); Valentin-Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 97 (1st Cir. 2006);

Ruffino v. State St. Bank & Trust Co., 908 F. Supp. 1019, 1045 (D.Mass.1995) (unfair criticisms and negative evaluation help constitute an adverse action).

Professional ostracism and exclusion may be an adverse action. Burlington Northern and Santa Fe Railway Co. v. White, 126 S. Ct. 2405, 2415 (2006) (exclusion from weekly lunches may be materially adverse); Simas v. First Citizens' Federal Credit Union, 170 F.3d 37, 52 n. 12 (1st Cir. 1999) (professional ostracism, where encouraged by the employer and where some harm results).

There are many cases standing for the fact that lost opportunities, which have the effect of impairing access to further advantages, may be themselves adverse actions. Franks v. Bowman Transportation Co., 424 U.S. 747, 763 (1976); Perry v. Donovan, 2010 U.S. Dist. LEXIS 85760 (D.D.C. Aug. 20, 2010) ("[T]his Court has recognized that denial of an opportunity for promotion constitutes an adverse employment action"); Cones v. Shalala, 199 F.3d 512, 521 (D.C. Cir. 2000) ("refusing to allow [an employee] to compete for [a] promotion is tantamount to refusing to promote him"); Davis v. District of Columbia, 503 F. Supp. 2d 104, 125 (D.D.C. 2007) ("[D]enying a promotion or the opportunity to compete for a promotion is a materially adverse action"); Agusty-Reyes v. Dept. of Education of the Commonwealth of Puerto Rico, 601 F.3d 45, 54 (1st Cir. 2010) (a delayed and dismal evaluation that interferes with the opportunity for tenure may be a tangible adverse action); McSweeney v. Trial Court of Massachusetts, Decision of the Hearing Officer, MCAD Docket No. 07-BEM-01947, Judith Kaplan, August 11, 2011, at 32-33 (promotional opportunities).

CONCLUSION

Plaintiffs should respond to the restrictive Nassar decision by aggressively pushing the limits of what is considered an adverse action, and by broadening the concept of "but for" causation.