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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MICHAEL OMIDI, M.D., Plaintiff and Appellant, v. NATIONAL RESIDENT MATCHING PROGRAM, Defendant and Respondent.	B280150 (Los Angeles County Super. Ct. No. BC548750)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teresa Beaudet, Judge. Affirmed.

Law Offices of Kamille Dean and Kamille Dean; Law Office of Francis J. Flynn, Jr. and Francis J. "Casey" Flynn, Jr. for Plaintiff and Appellant.

Reed Smith, Raymond A. Cardozo, Peter J. Kennedy and Tuan V. Uong for Defendant and Respondent.

Plaintiff and appellant Michael Omidi, M.D. (Omidi) appeals a judgment in favor of defendant and respondent National Resident Matching Program (NRMP) after the trial court sustained a demurrer without leave to amend as to certain causes of action and granted summary judgment with respect to the remaining cause of action.

As discussed below, we perceive no error in the trial court's rulings and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

NRMP, a nonprofit organization, provides a service that matches applicants to medical residency and fellowship programs across the United States, pursuant to a Match Participation Agreement (Agreement) to which applicants and training programs agree to be bound.

On January 5, 2011, Omidi applied to the University of California at San Diego (UCSD) for a cardiothoracic fellowship. He registered with NRMP for the matching program, and was matched to UCSD on June 15, 2011, with the fellowship to commence the following summer.

On February 17, 2012, Kevin Schunke, a manager at the Medical Board of California (Medical Board), sent an email to an employee at the UCSD School of Medicine which included a link to a January 17, 2012 article that appeared in the Los Angeles Times Business section. The article was captioned "Plaintiffs allege 'gruesome conditions' at Lap-Band clinics," and stated the lawsuit sought damages from eight people, including brothers Michael and Julian Omidi, who allegedly ran the weight-loss business.

On February 23, 2012, Schunke sent another email to Cindy Slaughter at UCSD, with the notation "Just looking out for

my friends." This email copied an article that had appeared in the Los Angeles Times the previous day, stating that Omidi, the owner of 1-800-GET-THIN and its affiliated surgery centers, had been named as a defendant in a lawsuit alleging identity theft for using a physician's name, without the physician's permission, to establish a corporation that billed insurers.

On February 28, 2012, UCSD sent a letter to NRMP requesting a waiver of its match commitment to Omidi, based on news reports that contained serious allegations against Omidi. NRMP notified Omidi of UCSD's waiver request and inquired if he wished to respond. Omidi responded in an April 23, 2012 email to NRMP stating he had no interest in challenging UCSD's waiver request. NRMP granted UCSD's waiver request, as it was unopposed.

NRMP then conducted its own investigation and determined that Omidi had violated the Agreement by failing to provide complete, timely, and accurate information to the program to which he sought to match. NRMP imposed sanctions barring Omidi from participating in NRMP matches for two years.

Under the terms of the Agreement, disputes relating to the match or the Agreement were subject to binding arbitration. Omidi demanded arbitration through the American Arbitration Association to contest NRMP's imposition of sanctions against him. The matter was arbitrated in Washington, D.C. before a retired justice of the Supreme Court of Virginia, who issued an award in favor of NRMP on February 26, 2014.

On June 16, 2014, Omidi commenced the instant action in the superior court against NRMP and others, including Schunke and the Medical Board. As relevant to this appeal, the operative

first amended complaint (FAC) pled causes of action against NRMP for (1) violation of civil rights under 42 U.S.C. section 1983, (2) violation of the Fair Credit Reporting Act (FCRA) (15 U.S.C. § 1681 et seq.), (3) sexual harassment based on a hostile work environment, pursuant to the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), and (4) state civil rights violations (Civ. Code, §§ 51, 52.1).

The trial court sustained NRMP's demurrer to the causes of action under the FCRA, the FEHA, and the Civil Code, without leave to amend. It ruled, inter alia: The FCRA claim against NRMP was not well pled because UCSD, rather than NRMP, was alleged to be Omidi's employer, and therefore NRMP did not take an adverse employment action against Omidi based on a consumer report. Similarly, Omidi failed to state a cause of action against NRMP for sexual harassment because NRMP was not his employer. Also, no cause of action was stated under Civil Code section 52.1 because Omidi did not allege violence or intimidation by threat of violence.

Thereafter, NRMP successfully moved for summary judgment on the remaining cause of action under 42 U.S.C. section 1983, on the ground that it was not a state actor and did not act under color of state law.

On January 10, 2017, Omidi filed a timely notice of appeal.[1]

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[1] Although the notice of appeal specified the order granting summary judgment, an order granting summary judgment is a preliminary nonappealable order; the appeal should be from the judgment entered. (*Modica v. Merin* (1991) 234 Cal.App.3d 1072, 1074–1075, fn. 1; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 160, p. 236.) We treat the notice of appeal filed January 10, 2017, as a premature notice of appeal from the final judgment in

CONTENTIONS

Omidi contends the trial court erred (1) in sustaining NRMP's demurrer to his causes of action under the FCRA, the FEHA, and Civil Code sections 51 and 52.1, and (2) in granting summary judgment with respect to his claim under 42 U.S.C. section 1983.

DISCUSSION

I. **Rulings on demurrer**.

1. *Standard of appellate review*.

"In determining whether [a] plaintiff[] properly stated a claim for relief, our standard of review is clear: ' "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court

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favor of NRMP, entered on March 6, 2017. (Cal. Rules of Court, rule 8.104(d); *Taylor v. Trimble* (2017) 13 Cal.App.5th 934, 939.)

Although Omidi failed to include a copy of the final judgment in his Appellant's Appendix, at oral argument he withdrew his objection to the Respondent's Appendix containing the judgment. In order to be able to resolve the appeal on the merits, we granted Omidi's request to withdraw his objection to the Respondent's Apppendix solely with respect to the judgment, found at pages 67 and 68 of the Respondent's Appendix.

has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' [Citations.]" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) Our review is de novo. (*Ibid*.)

2. *No cause of action stated for violation of the FCRA.*

a. *The FCRA generally*.

It is the purpose of the FCRA (15 U.S.C. § 1681 et seq.) "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of [the FCRA]." (15 U.S.C. § 1681(b).)

The FCRA defines the term "consumer reporting agency" as "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." (15 U.S.C. § 1681a(f).)

b. *Omidi's allegations with respect to NRMP; trial court's ruling.*

Omidi pled, inter alia, that Schunke and the Medical Board are a consumer reporting agency, that they provided a consumer report concerning Omidi to both UCSD and NRMP, they failed to make required disclosures to Omidi and deprived him of the opportunity to challenge the misleading information in the

Medical Board's employment report that Schunke secretly provided to NRMP and UCSD, and that NRMP aided and abetted the violations of the FCRA by assisting Schunke to make the improper report, concealing the improper report, and failing to provide a copy of the report to the job applicant as required by law.

In sustaining NRMP's demurrer to this cause of action, the trial court ruled "the problem . . . is that NRMP is not alleged to be in an employment relationship with Plaintiff and there is no allegation that NRMP procured Plaintiff's consumer report for 'employment purposes.' Rather, Plaintiff alleges an employment relationship with UCSD. . . . Moreover, UCSD, and not NRMP, is alleged to have taken the adverse action against Plaintiff by terminating his fellowship."

The trial court also rejected Omidi's argument that NRMP could be held liable under an aiding and abetting theory for the consumer agency's failure to properly furnish a consumer report for employment purposes. It ruled that Omidi had not provided any authority for that proposition, and further, he had failed to allege specific facts to establish that NRMP knew of and/or provided substantial assistance or encouragement in connection with the alleged FCRA violations.

c. *No merit to Omidi's contentions on appeal with respect to his FCRA claim*.

Omidi argues the trial court erred in ruling that NRMP could not be held directly liable under 15 U.S.C. § 1681b(b)(3)(A).[2]

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[2] Although the FAC alleged various violations of the FCRA, we confine our discussion to 15 U.S.C. § 1681b(b)(3)(A) because that is the sole alleged violation addressed by Omidi in his opening brief.

As relevant to this appeal, 15 U.S.C. § 1681b(b)(3)(A) reads as follows:

"(3) Conditions on use for adverse actions.

(A) In general. [¶] Except as provided in subparagraph (B*), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates—*

(i) a copy of the report; and

(ii) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Bureau under section 1681g(c)(3) of this title." (Italics added.)

Omidi pled that under the fellowship, he was an employee of UCSD, and that it was UCSD that terminated his fellowship based upon a false and sham allegation. Because NRMP admittedly was not Omidi's employer, Omidi cannot state a claim against NRMP for taking an adverse employment action against him in violation of the FCRA's disclosure requirements.

Omidi's alternative argument is that NRMP can be held liable for *aiding and abetting* the other defendants' alleged violation of 15 U.S.C. § 1681b(b)(3)(A). This argument similarly fails. As the trial court observed, the sole authority cited by Omidi for that proposition, *Galper v. JP Morgan Chase Bank, N.A.* (2d Cir. 2015) 802 F.3d 437, 446, is inapposite. That decision addressed federal preemption of a state claim for aiding and abetting identity theft in violation of a New York statute. (*Ibid.*) It does not stand for the proposition that a defendant may be held liable for aiding and abetting a violation of the FCRA.

Further, even assuming that liability may be alleged under 15 U.S.C. § 1681b(b)(3)(A) under an aiding and abetting theory,

Omidi failed to allege any facts to show that NRMP aided and abetted UCSD's nondisclosure of his rights before UCSD took adverse employment action against him. We reiterate the trial court's ruling that Omidi "fail[ed] to allege specific facts to establish that NRMP knew about and/or provided substantial assistance or encouragement in connection with the alleged FCRA violation[]."

For these reasons, the trial court properly sustained NRMP's demurrer to the FCRA claim without leave to amend.

3. *Trial court properly sustained NRMP's demurrer to Omidi's sexual harassment claim without leave to amend.*

Omidi alleged he was the victim of third party sexual harassment by Schunke. Omidi pled that Schunke harassed and solicited men in the Graduate Medical Education Department at UCSD through a series of emails during 2012, that he, Omidi, discovered the emails in April 2014, and that Schunke's sexual harassment created a hostile work environment. As against NRMP, he pled that NRMP "aided and abetted Schunke in his sexual harassment."

However, as the trial court recognized, the FEHA claim against NRMP is not well pled because NRMP was not Omidi's employer. The cases Omidi cites for the proposition that NRMP, which was not his employer, may be held liable for sexual harassment under an aiding and abetting theory, are inapposite. (See *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1235–1237 [employer strictly liable for harassment by supervisors]; *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 919–920 [employer liability for sexual harassment of employee by client or customer]; *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1034

[employer strictly liable under FEHA for sexual harassment by supervisor].)

The sexual harassment claim fails for the additional reason that Omidi failed to allege he suffered a hostile work environment. "[T]o establish liability in a FEHA hostile work environment sexual harassment case, a plaintiff employee must show [he] was subjected to sexual advances, conduct, or comments that were severe enough or sufficiently pervasive to alter the conditions of [his] employment and create a hostile or abusive work environment. [Citations.]" (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283, italics omitted.) Further, a hostile work environment sexual harassment claim by a plaintiff "who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [his] direct work environment.' [Citation.]" (*Id.* at p. 285.) Here, Omidi alleged he did not discover Schunke's sexual harassment until April 2014, two years after his match was terminated, when he learned of Schunke's emails. Given that Omidi did not learn of the alleged sexual harassment until after USCD withdrew his fellowship, Omidi did not perceive or experience sexual harassment during the employment period and therefore is incapable of stating a cause of action for sexual harassment arising out of a hostile work environment.

4. *No cause of action stated for alleged Civil Code violations*.

Civil Code section 52.1 (the Tom Bane Civil Rights Act) authorizes an action against anyone who interferes, or tries to

interfere, by threats, intimidation, or coercion, with an individual's exercise or enjoyment of rights secured by federal or state law. (*Jones v. Kmart Corp*. (1998) 17 Cal.4th 329, 331.) "Speech alone is not sufficient to support an action brought [under the statute], except upon a showing that the speech itself threatens violence against a specific person or group of persons; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence had the apparent ability to carry out the threat." (Civ. Code, § 52.1, subd. (j).)

As the trial court found, Omidi failed to allege sufficient facts to show that NRMP engaged in threats, intimidation or coercion to deprive him of his rights. Omidi's allegations that NRMP deprived him of his rights, and that it concealed its misconduct, are insufficient to state a claim under the Bane Act.[3]

II. **Summary judgment proceedings**.

1. *Evidentiary rulings*.

Omidi contends the trial court erred in sustaining NRMP's objections to his opposing evidence based on lack of authentication. It appears Omidi is specifically challenging the trial court's ruling insofar as it disallowed exhibits 1 through 10 to the declaration of Attorney Mark Jubelt, consisting of a series of emails.[4]

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[3] Omidi's related argument that he stated a claim under Civil Code section 51, the Unruh Civil Rights Act, is undeveloped and therefore requires no discussion.

[4] The trial court's order reflects that the court sustained NRMP's objections to the following: the Jubelt declaration; the Jamieson declaration (Part I) except for paragraph 10, lines 16 to

We do not address Omidi's claim of evidentiary error because he omitted NRMP's evidentiary objections from the record on appeal, and thus failed to provide an adequate record for review. (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 494 [appellant bears the burden of providing an adequate record affirmatively proving error].) Without NRMP's evidentiary objections to Omidi's papers, this court cannot review whether the trial court erred in sustaining NRMP's objections. (See Evid. Code, § 354 [appellate review of claim of error based on exclusion of evidence].) Accordingly, Omidi has forfeited his claim of evidentiary error.

We observe however, that any error, if it occurred, was harmless. Although the trial court's ruling stated that NRMP's objection to the emails was sustained, the trial court went on to state that "[e]ven if the Court were to consider the emails, this evidence does not in any way show that NRMP was a willful participant in UCSD's decision to withdraw the fellowship." Thus, the trial court did in fact consider the emails in determining whether Omidi raised a triable issue of material fact.

We now turn to the merits of the issue.

18; the Jamieson declaration (Part II) except for paragraph 1, lines 1 to 7, ending with the word "minutes"; the Madani declaration (Part I); the Madani declaration (Part II) except for paragraph 6, lines 3–4; and the Rice declaration. In addition, the trial court overruled Omidi's evidentiary objections to NRMP's evidence.

2. *Trial court properly granted summary judgment on the ground NRMP was not a state actor and did not act under color of state law.*

a. *Standard of appellate review.*

We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.)

b. *Federal civil rights claim.*

To state a claim under 42 U.S.C. section 1983, the plaintiff must allege that a person acting under color of state law deprived him or her of a federally guaranteed right. (*Naffe v. Frey* (9th Cir. 2015) 789 F.3d 1030, 1035–1036.) "While generally not applicable to private parties, a [section] 1983 action can lie against a private party when 'he is a willful participant in joint action with the State or its agents.' " (*Kirtley v. Rainey* (9th Cir. 2003) 326 F.3d 1088, 1092 (*Kirtley*).)

Here, Omidi pled that NRMP is a nonprofit Illinois corporation, and thus a private entity, but he contends that a triable issue of material fact exists as to whether NRMP was a state actor due to its "symbiotic relationship" with UCSD, and due to Dr. Savoia's dual role as an employee of UCSD and as a member of NRMP's board of directors.

Federal law governs whether a private party is a state actor, and we review a trial court's resolution of this question de novo. (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 396.) "We start with the presumption that conduct by private actors is not state action." (*Florer v. Congregation Pidyon Shevuyim, N.A.* (9th Cir. 2011) 639 F.3d

916, 922.) Thus, Omidi bears the burden of showing that NRMP was a state actor. (*Ibid*.)

c. *The* Tarkanian *decision and its application here*.

Our analysis is guided by the United States Supreme Court's decision in *National Collegiate Athletic Assn. v. Tarkanian* (1988) 488 U.S. 179 [102 L.Ed.2d 469] (*Tarkanian*), which addressed whether the National Collegiate Athletic Association's (NCAA) conduct therein constituted state action.

The NCAA is an unincorporated association of approximately 960 members, including virtually all public and private universities and four-year colleges conducting major athletic programs in the United States. (*Tarkanian*, *supra*, 488 U.S. at p. 183.) After a lengthy investigation of allegedly improper recruiting practices by the University of Nevada, Las Vegas (UNLV), a state university, the NCAA found numerous violations, including 10 committed by Tarkanian, UNLV's head basketball coach. (*Id*. at pp. 185–186.) The NCAA imposed a number of sanctions upon UNLV, and requested UNLV to show cause why additional penalties should not be imposed if it failed to remove Tarkanian from its athletic program during a probation period. (*Id*. at p. 186.) Facing demotion and a drastic cut in pay, Tarkanian brought suit in Nevada state court, alleging that he had been deprived of his Fourteenth Amendment due process rights in violation of 42 U.S.C. section 1983. (*Id*. at p. 181.) Tarkanian prevailed in state court against both UNLV and the NCAA. Concluding that the NCAA engaged in state action when it conducted its investigation and recommended that Tarkanian be disciplined, the Nevada Supreme Court affirmed in relevant part. (*Id*. at pp. 181–182, 189.)

The United States Supreme Court reversed, concluding that the NCAA did not engage in state action. It explained:

"In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct, [citation]; if it delegates its authority to the private actor, [citation]; or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior, [citation]. Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.

"This case uniquely mirrors the traditional state-action case. Here the final act challenged by Tarkanian — his suspension — was committed by UNLV. A state university without question is a state actor. When it decides to impose a serious disciplinary sanction upon one of its tenured employees, it must comply with the terms of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. [Citations.] Thus when UNLV notified Tarkanian that he was being separated from all relations with the university's basketball program, it acted under color of state law within the meaning of 42 U.S.C. § 1983.

"The mirror image presented in this case requires us to step through an analytical looking glass to resolve the case. Clearly UNLV's conduct was influenced by the rules and recommendations of the NCAA, the private party. But it was UNLV, the state entity, that actually suspended Tarkanian. Thus the question is not whether UNLV participated to a critical

extent in the NCAA's activities, but whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action." (*Tarkanian*, *supra*, 488 U.S. at pp. 192–193, fn. omitted.)

Tarkanian began by examining the relationship between UNLV and the NCAA regarding the NCAA's rulemaking. "UNLV is among the NCAA's members and participated in promulgating the Association's rules; it must be assumed, therefore, that Nevada had some impact on the NCAA's policy determinations. Yet the NCAA's several hundred other public and private member institutions each similarly affected those policies. Those institutions, the vast majority of which were located in States other than Nevada, did not act under color of Nevada law. It necessarily follows that the source of the legislation adopted by the NCAA is not Nevada but the collective membership, speaking through an organization that is independent of any particular State." (*Tarkanian*, *supra*, 488 U.S. at p. 193.)

Although UNLV engaged in state action when it adopted the NCAA's rules to govern its own behavior, "[n]either UNLV's decision to adopt the NCAA's standards nor its minor role in their formulation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated standards governing athlete recruitment, eligibility, and academic performance." (*Tarkanian*, *supra*, 488 U.S. at pp. 194–195.)

Tarkanian rejected the argument that the NCAA's investigation, enforcement proceedings, and consequent recommendations constituted state action because they resulted from a delegation of power by UNLV. UNLV, as an NCAA

member, subscribed to the statement in the NCAA's bylaws "that NCAA 'enforcement procedures are an essential part of the intercollegiate athletic program of each member institution.' . . . It is, of course, true that a State may delegate authority to a private party and thereby make that party a state actor. . . . But UNLV delegated no power to the NCAA to take specific action against any university employee. The commitment by UNLV to adhere to NCAA enforcement procedures was enforceable only by sanctions that the NCAA might impose on UNLV itself." (*Tarkanian*, *supra*, 488 U.S. at pp. 195–196.)

Further, the NCAA lacked any governmental powers to facilitate its investigation. It had no power to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individual. Its greatest authority was to threaten sanctions against UNLV, with the ultimate sanction being expulsion of the university from membership. (*Tarkanian*, *supra*, 488 U.S. at p. 197.)

Tarkanian also rejected the argument that the power of the NCAA "is so great that the UNLV had no practical alternative to compliance with its demands. We are not at all sure this is true, but even if we assume that a private monopolist can impose its will on a state agency by a threatened refusal to deal with it, it does not follow that such a private party is therefore acting under color of state law." (*Tarkanian*, *supra*, 488 U.S. at pp. 198–199, fn. omitted.)

Tarkanian concluded, "[i]n final analysis the question is whether 'the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State.' [Citation.] It would be ironic indeed to conclude that the NCAA's imposition of sanctions against UNLV . . . is fairly attributable to the State

of Nevada. It would be more appropriate to conclude that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law." (*Tarkanian*, *supra*, 488 U.S. at p. 199.)

NRMP's relationship to UCSD is analogous to the NCAA's relationship to UNLV. As in *Tarkanian*, UCSD did not delegate any official state power to NRMP, and UCSD's commitment to adhere to the Match Participation Agreement was enforceable only through NRMP's imposition of private contractual sanctions pursuant to section 7.2 of the Agreement. UCSD entered into NRMP's matching program for advanced residency and fellowship positions, a program that is available to public and private institutions alike. Further, NRMP is authorized by the Agreement to sanction a residency or fellowship program for a violation thereof, just as the NCAA was authorized to impose sanctions against UNLV. Thus, as in *Tarkanian*, it would be more accurate to conclude that UCSD conducted its residency program under color of the policies adopted by NRMP, rather than that NRMP's policies were developed and enforced under color of state law.

d. *Omidi failed to raise a triable issue of material fact based on Savoia's connection to NRMP.*

Citing *Kerr v. Hurd* (S.D. Ohio 2010) 694 F.Supp.2d 817 (*Kerr*), Omidi contends Savoia's dual role as a UCSD dean and as a volunteer member of NRMP's board of directors raises a triable issue of material fact as to whether NRMP was a state actor. As explained below, Omidi's reliance on *Kerr* is misplaced.

In *Kerr*, Dr. Hurd chaired the department of obstetrics and gynecology at a state university medical school, and also headed

the parallel department at University Medical Services Association (UMSA), an Ohio corporation, which was the exclusive entity through which faculty members at the medical school could be employed to perform medical services. (*Kerr*, *supra*, 694 F.Supp.2d at pp. 827–828.) The issue presented was whether a genuine issue of fact existed as to whether UMSA was acting under color of state law when it allegedly retaliated against Dr. Kerr for his protected speech. (*Id.* at pp. 837–840.) Noting that the analysis is highly "fact-specific" (*id.* at p. 839), the *Kerr* court found a triable issue on the question of whether UMSA was acting under color of state law. (*Id.* at p. 840.)

Kerr explained, "While UMSA is a private corporation, it appears that it has a very close relationship with Wright State [University]: it appears to exist as the sole entity through which Wright State School of Medicine faculty can practice medicine. It also appears that the chair of the parallel department at the Medical School is *ex officio* chair of the ob/gyn department of UMSA. . . . . [Dr. Hurd,] the state actor who is alleged to have had the unconstitutional animus against the Plaintiff is the very same person who, it is alleged, was in a position to give vent to that animus within UMSA." (*Kerr*, *supra*, 694 F.Supp.2d at p. 839.)

Unlike the fact situation presented in *Kerr*, the undisputed evidence shows that Dr. Savoia did not act in a dual capacity in the instant case, notwithstanding her role as a volunteer member of NRMP's board of directors. The separate statements of undisputed facts established that NRMP was *not* involved in UCSD's decision to seek to withdraw Omidi's fellowship and to seek a waiver from NRMP of its match commitment to Omidi. Although there was evidence (specifically, an April 24, 2012 letter

from Dr. Thistlewaite at UCSD seeking a waiver from NRMP) that Savoia was among the decisionmakers at UCSD who participated in the decision to request termination of UCSD's match agreement with Omidi, there was no evidence that in doing so, Savoia acted in anything other than her capacity as Dean of Medical Education at UCSD. The fact that Savoia was involved in UCSD's decision that Omidi not enter its thoracic surgery fellowship program due to allegations against Omidi and his surgery centers does not raise a triable issue of material fact that NRMP was sufficiently involved in Omidi's termination to make it a state actor.

Thus, this case is analogous to *Austin v. Diaz* (6th Cir. 1999) 194 F.3d 1311, 1999 WL 970313 (*Austin*), which was cited and distinguished by the *Kerr* court. (*Kerr*, *supra*, 694 F.Supp.2d at pp. 838–839.) In that case, Dr. Austin was a member of the Neurosurgery Department at Harper Hospital, a private entity, and also a faculty member at Wayne State University Medical School, a state university medical school. Dr. Diaz was Chief of the Harper Neurosurgery Department and also Chairman of the Wayne State Neurological Surgery Department. Dr. Austin charged that Harper Hospital, a private entity, retaliated against him for exercising his First Amendment rights. Austin sued Harper Hospital, Wayne State, Diaz, and the Wayne State dean. The district court granted Harper Hospital summary judgment "on the grounds that Harper was not of itself a state actor, and that the plaintiff failed to produce sufficient evidence to demonstrate that Harper is chargeable as a state actor by reason of any nexus or 'symbiotic relationship' with [Wayne State University]." (*Id*. at *1.) The Sixth Circuit affirmed, stating, "*Dr. Diaz's dual positions with* [*Wayne State*] *and Harper, likewise, do*

not establish the state's role or connection to the challenged conduct. The plaintiff has failed to produce any evidence—other than his own speculation—that Diaz was subjected to coercive power or significant overt or covert encouragement by the state in making decisions concerning the plaintiff's committee membership or title within Harper. There is no evidence that Dr. Diaz was acting in any capacity other than that as Chief of the Neurosurgery Department at Harper, a private entity, when he made these decisions." (*Id*. at *3, italics added.)

Similarly, in the instant case, the evidence showed that Savoia was *not* involved in NRMP's decision to grant UCSD a waiver of its match commitment to Omidi, and that Savoia's involvement was limited to her role as Dean of Medical Education at UCSD. Therefore, Savoia's participation in UCSD's decision to withdraw Omidi's fellowship does not raise a triable issue of material fact with respect to NRMP's status as a state actor.

Omidi also argues that his decision not to challenge UCSD's waiver request was fraudulently obtained by UCSD, based on its false and pretextual *post hoc* claim that he did not make full disclosure of prior lawsuits in his application, and that Savoia participated in the pretextual match waiver request to Omidi, wherein he was not told of the true reason for UCSD seeking the waiver from NRMP. Again, this merely shows that Savoia participated in UCSD's decision to terminate Omidi, but it does not raise a triable issue of material fact as to NRMP's involvement as a state actor.

In this regard, Omidi relies on a May 23, 2012 email from Savoia to Dr. Hayden, a faculty member at UCSD, stating: "I need to find a copy of the letter we sent to Omidi [re the request for the match waiver to NRMP]. Don't remember the detail. If

we included no details then maybe we send him what we sent the NRMP. I've been on the receiving end of a lot of these and don't remember seeing the person copied on the letters but mostly it is applicants asking for waivers from programs. Laurie [Curtin at NRMP] has been travelling. *Better I not get involved calling her — conflict of interest —* but maybe you should call her Monday a.m. and see if we need to send more. I thought we just needed to notify him that we were seeking the waiver." (Italics added.) However, this email does not give rise to an inference that Savoia acted in anything other than her role as a dean at UCSD, and thus does not implicate NRMP in UCSD's decision to terminate Omidi's fellowship.

The evidence further showed that Savoia was not involved in NRMP's decision to grant UCSD a waiver of its match commitment to Omidi, NRMP's investigation into Omidi's conduct, NRMP's determination that Omidi had breached the match agreement, or NRMP's decision to sanction Omidi. In sum, Savoia's role at UCSD in terminating Omidi's fellowship did not raise a triable issue of material fact as to whether NRMP acted under color of state law in granting UCSD a waiver of its match commitment to Omidi.

Accordingly, the trial court properly granted summary judgment in favor of NRMP on Omidi's civil rights claim under 42 U.S.C. section 1983.

DISPOSITION

The judgment in favor of NRMP is affirmed. NRMP shall recover its costs on appeal. NRMP's motion for sanctions on appeal is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.