IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

PETER P. MOE, Plaintiff, v. GRINNELL COLLEGE, Defendant.	**No. 4:20-cv-00058-RGE-SBJ** **ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS**

I. INTRODUCTION

Plaintiff Peter P. Moe[1] filed suit against Defendant Grinnell College after Grinnell College expelled him for violating its sexual misconduct policy. In Count I of his four-count Complaint, Moe alleges Grinnell College violated Title IX of the Education Amendment of 1972. Grinnell College moves for judgment on the pleadings as to Count I. Grinnell College argues it is entitled to judgment as a matter of law on Count I to the extent Moe asserts a cat's paw theory of liability. Grinnell College argues the cat's paw theory cannot create Title IX liability. Moe argues the cat's paw theory is not applicable to Count I. For the reasons set forth below, the Court denies Grinnell College's motion for judgment on the pleadings as to Count I.

II. SUMMARY OF RELEVANT FACTS

The Court accepts the facts alleged in Moe's complaint as true for the purpose of considering Grinnell College's motion for judgment on the pleadings. *See Rossley v. Drake Univ.*,

[1] Moe uses the pseudonym "Peter P. Moe" rather than John Doe to avoid confusion with the case *John Doe v. Grinnell Coll. et al.*, No. 4:17-cv-00079-RGE-SBJ. *See* Compl. 1 n.1, ECF No. 1; *see also* Order Granting Pl.'s Mot. Proceed Under Pseudonym, ECF No. 14. In the Complaint, Moe refers to himself with the pronouns "he" or "him." ECF No. 1 *passim*; *see also* Moe Dep. 27:14–15, ECF No. 53-7. The Court follows suit.

958 F.3d 679, 683 (8th Cir. 2020).

In recounting the facts relevant to Grinnell College's motion for judgment on the pleadings, the Court first sets forth Grinnell College's sexual misconduct policy. The Court then recounts portions of the disciplinary process relevant to Moe's expulsion.

A. Grinnell College's Sexual Misconduct Policy

"Grinnell College Policy, Procedures and Guide to Preventing, Reporting, and Responding to Sexual Misconduct and Other Forms of Interpersonal Violence" (the Policy) governs sexual assault investigations and discipline at Grinnell College. Pl.'s Ex. 1 Supp. Resist. Def.'s Mot. J. Pleadings, ECF No. 31-3. At the beginning of each fall semester Grinnell College provides students with the Policy. ECF No. 1 ¶ 84. The Policy has changed over the years. *See id.* ¶¶ 43, 86. The September 2017 Policy was in effect when the events at issue occurred. *See id.* ¶ 86. The Policy is intended to "[p]rovide the Grinnell College community with a clear set of behavioral standards and clear definitions of prohibited conduct." ECF No. 31-3 at 2. The Policy "prohibits . . . sexual assault." *Id.* at 13–14. "A violation of [the Policy] may result in suspension or dismissal." *Id.* at 52.

Under the Policy, any individual who is affected by prohibited conduct may file a complaint with Grinnell College's Title IX office. *See id.* at 24. After an individual Complainant files a complaint against a Student-Respondent,[2] the Dean of Students conducts an initial assessment. *Id.* at 34–35. The initial assessment "consider[s] the nature of the report, the Complainant's expressed preference for resolution, and the appropriate course of action, which may include Informal or Formal Resolution." *Id.* at 35. "Informal Resolution does not

[2] The Policy has different procedures for student-respondents, staff member-respondents, or faculty member-respondents. ECF No. 31-3 at 34. The Court uses Respondent to refer to student-respondents.

involve . . . [corrective] action or conduct findings against a Respondent." *Id.* at 42. In a Formal Resolution, Grinnell College conducts an investigation into the allegations. *Id.* at 44.

Once Grinnell College initiates an investigation against a Respondent in a Formal Resolution, the Dean of Students issues a written Notice of Investigation to the Complainant and the Respondent. *Id.* The Title IX Coordinator then appoints a trained investigator "to conduct a prompt, equitable, thorough, and impartial investigation of reports of Prohibited Conduct." *Id.* The investigator is responsible for interviewing the parties separately; interviewing potential witnesses; collecting relevant documentation and physical evidence; and preparing a final written report documenting the investigation (the final investigation report). *Id.* at 45. The final investigation report "provides a statement of the policy violation(s) that are alleged to have taken place and a summary of the facts underlying the allegations." *Id.* at 48. The final investigation report does not provide findings as to the investigation. *Id.*

The final investigation report forms the basis for the adjudicator's determination as to whether the Respondent violated the Policy. *Id.* The Dean of Students, another college administrator serving as the Dean's designee, or a trained individual external to Grinnell College serves as the adjudicator. *Id.* "The adjudicator bears the ultimate responsibility of determining, by a preponderance of the evidence, whether the Respondent is responsible for committing Prohibited Conduct in violation of [the] [P]olicy." *Id.* The adjudicator must review all pertinent information about the incident. *Id.* at 50. Then the adjudicator deliberates privately and writes an opinion documenting the adjudicator's findings by a preponderance of the evidence. *Id.* at 51. The adjudicator's findings detail the findings of fact and the rationale for the adjudicator's decision. *Id.*

If the adjudicator determines a Respondent committed prohibited conduct, the adjudicator will recommend an appropriate educational outcome, or sanction, to the Dean of Students. *Id.* at

52. The Dean of Students is not bound by the adjudicator's recommended sanction and may broaden or lessen any recommended sanction. *Id.* Generally, a student responsible for nonconsensual sexual intercourse is suspended or expelled, while a student responsible for nonconsensual sexual contact may receive a range of sanctions from a warning to expulsion. *Id.*

The Complainant or the Respondent may appeal the outcome. *Id.* at 54. Parties may appeal either: because "[n]ew evidence that was not available at the time of the investigation is presented that could be outcome-determinative; and/or [p]rocedural error(s) . . . had a material impact on the outcome." *Id.* The appeal must include a plain, concise, and complete written statement explaining the grounds for the appeal. *Id.* Per the Policy, the Associate Vice President of Student Affairs, decides the appeal. *Id.* at 55–57.

B. Complaints and Proceedings Against Moe

On February 12, 2018, Complainant 1,[3] a female student at Grinnell College, filed a complaint against Moe with the Title IX office. ECF No. 1 ¶ 95. Complainant 1 alleged Moe engaged in sexual misconduct with her and alleged Moe may have done so with other students. *Id.* After conferring with Complainant 1, two other female students at Grinnell College—Complainant 2 and Complainant 3—filed complaints against Moe. *See id.* Complainant 1 alleged Moe engaged in nonconsensual sexual intercourse with her. *Id.* ¶ 108. Complainant 2 alleged Moe engaged in nonconsensual sexual intercourse with her. *See id.* ¶¶ 138, 146, 165. Complainant 3 alleged Moe engaged in nonconsensual sexual contact with her. *Id.* ¶ 167.

On February 22, 2018, Sarah Moschenross, Grinnell College's Dean of Students, and Bailey Asberry, Grinnell College's Deputy Title IX Coordinator, met with Moe and banned him

[3] Moe refers to complainants as Complainant 1, Complainant 2, and Complainant 3. *See* ECF No. 1 ¶ 95 n.23, *passim*. The Court follows suit. The Court refers collectively to all three as Complainants.

from campus. *Id.* ¶¶ 97–98. Grinnell College hired an attorney from the Husch Blackwell law firm to investigate the Complainants' allegations, which Dean Moschenross had consolidated into one Title IX case. *See id.* ¶¶ 2, 92(xiii), 102. On May 17, 2018, the attorney-investigator from Husch Blackwell issued the final investigation report. *Id.* Per the Policy, the investigator did not make any findings in the final investigation report. *Id.* ¶ 103; ECF No. 31-3 at 49.

The final investigation report was provided to Grinnell College's adjudicator for Title IX claims, Marsha Ternus, former Chief Justice of the Iowa Supreme Court. *See* ECF No. 1 ¶¶ 117–18. After receiving and reviewing the final investigation report, Ternus held separate video conferences with Complainant 1, Complainant 2, and Moe. *See id.* ¶¶ 118, 119, 152. Because Complainant 3 declined to meet with Ternus, Ternus relied on the transcribed materials from the investigator's interviews with Complainant 3 to adjudicate her claim. *Id.* ¶ 181.

Ternus found Moe violated the Policy. *Id.* ¶¶ 131, 135, 165, 184. With regard to Complainant 1, Ternus found Moe was not responsible for nonconsensual sexual intercourse. *Id.* ¶ 135. Instead, Ternus found Moe responsible for nonconsensual sexual contact, a claim not alleged by Complainant 1 or charged against Moe. *See id.* ¶ 131. With regard to Complainant 2, Ternus found Moe responsible for nonconsensual sexual intercourse. *Id.* ¶ 165. With regard to Complainant 3, Ternus found Moe responsible for nonconsensual sexual contact. *Id.* ¶ 184.

Ternus predicated her findings that Moe violated the Policy on a pattern of behavior. Ternus found Moe exhibited a pattern as to Complainants whereby Moe engaged "in rather harmless or innocuous physical contact with a woman (sometimes gaining [her] trust and sympathy by sharing accounts of [Moe's] personal troubles) then escalating that contact into sexual activity." *Id.* ¶ 187. Ternus recommended either suspension or expulsion. *Id.* ¶ 196. Ternus submitted her findings and the recommended sanctions to Dean Moschenross. *Id.* ¶¶ 196–97. Dean Moschenross expelled Moe from Grinnell College. *Id.* ¶ 196.

On June 12, 2018, Moe appealed the adjudication findings. *Id.* ¶ 200. He argued "the adjudicator made substantial errors in the processing of evidence, substantially affecting the fairness of the decision." *Id.* On June 22, 2018, Vice President of Student Affairs Andrea Connor denied Moe's appeal. *Id.* ¶ 205.

C. Procedural Background

On February 19, 2020, Moe filed suit against Grinnell College. ECF No. 1. Moe's complaint alleges four counts. Moe alleges Grinnell College violated Title IX of the Education Amendments of 1972 by exhibiting gender bias against men in its adjudication and disciplinary process of Moe (Count I). *Id.* ¶¶ 218–39. He also alleges state law claims for breach of contract (Count II); breach of implied covenant of good faith and fair dealing (Count III); and wrongful discipline (Count IV). *Id.* ¶¶ 241–42, 246–49, 253–57. On May 7, 2020, the Court dismissed Moe's claim of breach of contract by sex discrimination and/or gender identity discrimination alleged in paragraph 242(i) of Count II of his complaint. Order Granting Def.'s Partial Mot. Dismiss 2, ECF No. 16.

Grinnell College now moves for judgment on the pleadings on Count I. ECF No. 29. Moe resists. ECF No. 31. Neither party requests a hearing. *See* ECF No. 29; ECF No. 30. The Court declines to order a hearing, finding the parties briefing adequately presents the issues. *See* LR 7(c); Fed. R. Civ. P. 78(b).

Additional facts are set forth below as necessary.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 12(c) provides that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." The Court "review[s] th[e] 12(c) motion under the standard that governs 12(b)(6) motions." *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). "While courts generally may not consider

materials outside the pleadings in deciding whether to grant a motion for judgment on the pleadings, courts may consider . . . materials that are necessarily embraced by the pleadings." *Saterdalen v. Spencer*, 725 F.3d 838, 841 (8th Cir. 2013) (internal quotation marks and citations omitted).

To survive a Rule 12(c) motion, the plaintiff's "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plausible claim for relief "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678–79. A plaintiff must plead and prove a plausible basis for each element of the claim or claims alleged. *Id.* at 678. "The essential function of a complaint under the Federal Rules of Civil Procedure is to give the opposing party 'fair notice of the nature and basis or grounds for a claim, and a general indication of the type of litigation involved.'" *Topchian v. JP Morgan Chase Bank, N.A.*, 760 F.3d 843, 848 (8th Cir. 2014) (quoting *Hopkins v. Saunders*, 199 F.3d 968, 973 (8th Cir. 1999)). The Court must accept as true all factual allegations in the complaint, but not its legal conclusions. *Iqbal*, 556 U.S. at 678–79 (citing *Twombly*, 550 U.S. at 555–56).

Plaintiffs must "nudge[ ] their claims across the line from conceivable to plausible, [else] their complaint must be dismissed." *Twombly*, 550 U.S. at 570. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

IV. DISCUSSION

Grinnell College argues it is entitled to judgment on the pleadings on Count I to the extent

Moe's claim is based on the cat's paw theory of liability. Def.'s Br. Supp. Mot. J. Pleadings 6–11, ECF No. 29-1. Grinnell College argues it cannot be held liable under Title IX for bias in Ternus's adjudication process because Ternus did not have "authority to address the alleged discrimination and to institute corrective measures on [Grinnell College's] behalf." *Id.* at 9–10 (quoting *Roe v. St. Louis Univ.*, 746 F.3d 874, 882 (8th Cir. 2014) (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998))). Grinnell College argues the cat's paw theory of liability is incompatible with Title IX, and Count I fails to state a plausible claim. *Id.* at 12. Grinnell College makes no other argument that it is entitled to judgment on the pleadings on Count I.

Moe argues he does not rely on the cat's paw theory of liability in Count I. ECF No. 31 ¶¶ 1–2. Moe contends Ternus was a decision maker under Title IX because she was a member of the disciplinary tribunal, and he may use her statements as evidence of sex bias in Grinnell College's disciplinary process. *Id.* ¶¶ 1–2, 4. Thus, Moe argues Count I states a plausible claim under Title IX. *Id.* ¶¶ 4–6.

Because Grinnell College only moves for judgment on the pleadings on Count I to the extent Moe relies on the cat's paw theory of liability, the Court first discusses the cat's paw theory of liability and when it applies. Then the Court reviews the Eighth Circuit's application of the cat's paw theory of liability outside of Title IX cases. Next, the Court reviews application of the cat's paw theory of liability in Title IX cases in other courts. Finding the cat's paw theory of liability does not apply here, the Court denies Grinnell College's motion for judgment on the pleadings.

"The cat's paw analysis applies in situations where a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *Cherry v. Siemens Healthcare Diagnostics, Inc.*, 829 F.3d 974, 977 (8th Cir. 2016) (internal quotation marks and citation omitted).

> [T]he purpose of [the cat's paw] rule is to ensure that an employer cannot shield itself from liability for unlawful termination by using a purportedly independent person or committee as the decisionmaker where the decisionmaker merely serves as the conduit . . . by which another achieves his or her unlawful design.

Id. (internal quotation marks and citation omitted). The Eighth Circuit has not considered whether the cat's paw theory of liability applies to Title IX cases. The Sixth Circuit has declined to apply the cat's paw theory of liability in Title IX cases. *See, e.g.*, *Bose v. Bea*, 947 F.3d 983, 989 (6th Cir. 2020) ("Our question today is whether the cat's paw theory can apply in Title IX cases. We hold that it cannot.").

The United States Supreme Court case *Gebser v. Lago Vista Independent School District* controls what person or entity may be held accountable under Title IX. 524 U.S. at 290. Title IX applies to recipients of "Federal financial assistance." 20 U.S.C. § 1681(a). In *Gebser*, the plaintiff sued her school district, a federal funding recipient, under Title IX because her teacher sexually harassed her. 524 U.S. at 277–78. The Supreme Court found that Title IX liability "is predicated upon notice to an 'appropriate person' and an opportunity to rectify any violation." *Id.* at 290. Consequently, the Supreme Court found no damages against a school are available under Title IX "unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the [federal funding] recipient's behalf has actual knowledge of discrimination in the [federal funding] recipient's programs and fails adequately to respond." *Id* This standard avoids the risk that the federal funding recipient "would be liable in damages not for its own official decision but instead for its employees' independent actions." *Id.* at 290–91.

Though the Eighth Circuit has not considered the cat's paw theory of liability in Title IX cases, it has discussed it in the Title VII workplace harassment context. In *Cherry v. Siemens Healthcare Diagnostics, Inc.*, the plaintiff sued his former employer alleging his termination was racially motivated. 829 F.3d at 975–76. The plaintiff argued his supervisor's racially motivated

comments and poor reviews resulted in the plaintiff's termination when there was a reduction in force of the lowest performing employees. *Id.* The court found the cat's paw theory of liability did not apply to the employer because there was no indication the plaintiff's supervisor knew of the reduction in force when the supervisor allegedly discriminated against the plaintiff. *Id.* Thus, the supervisor could not have used the company as a "dupe" to trigger a discriminatory employment action. *Id.* at 975–77.

The Sixth Circuit found the cat's paw theory of liability does not apply in Title IX cases. In *Bose v. Bea*, a former student sued her professor and her college alleging the decision to expel her violated Title IX. 947 F.3d at 985–87. She argued her professor retaliated against her by falsely accusing her of cheating after she rebuffed his sexual advances. *Id.* at 989. The court held the student could not use Title IX to sue her professor directly because "there is no individual liability under Title IX." *Id.* For the cat's paw theory of liability to apply, the court stated, the plaintiff had to show a "connection" between her opposition to the professor's unwelcome conduct and the college's act of expelling her. *Id.* The court held the cat's paw theory of liability did not apply to Title IX because Title IX liability "requires that the [college] itself be deliberately indifferent to known acts of . . . discrimination." *Id.* (second alteration in original) (internal quotation marks and citation omitted).

Because the cat's paw theory is inapplicable to Count I of Moe's complaint, the Court need not consider whether the Eighth Circuit would apply the cat's paw theory of liability to Title IX cases. Moe does not rely on the cat's paw theory of liability in Count I. *See* ECF No. 1 ¶¶ 234–35; Pl.'s Br. Supp. Resist. Def.'s Mot. J. Pleadings 8–10, ECF No. 31-1. Unlike the plaintiff in *Bose*, Moe does not sue Ternus in her individual capacity. *Cf.* 947 F.3d at 987, 989. Moe's complaint does not allege Ternus was "a biased subordinate, who lack[ed] decisionmaking power," or that she used Grinnell College as a dupe to trigger a discriminatory scheme. *Cherry*, 829 F.3d at 977.

Moe alleges, and the record supports, Ternus was an official decision maker on behalf of Grinnell College. *Cf. Gebser*, 524 U.S. at 290–91. She could address an issue of discrimination in Grinnell College's adjudication process because she was Grinnell College's adjudicator. *Cf. id.* Additionally, Ternus's adjudication is unlike a school employee's independent decision to harass a student. *Cf. Bose*, 947 F.3d at 985. Ternus's actions during the adjudication and her ultimate findings were made on behalf of Grinnell College—they were not actions taken in an individual capacity. Ternus's finding that Moe violated the Policy was the basis for Grinnell College's imposition of sanctions on Moe. *See* ECF No. 31-3 at 52–53. There is a direct connection between Ternus's determination that Moe violated the Policy and Grinnell College's decision to expel Moe. *Cf. Bose*, 947 F.3d at 989. Thus, the Court finds the cat's paw theory of liability inapplicable to Moe's Title IX claim.

Moreover, the Eighth Circuit has not foreclosed suits by students against their universities under Title IX for biased disciplinary procedures. *See Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 864–66 (8th Cir. 2020); *Rossley*, 979 F.3d at 1192. Students may sue their universities alleging sex bias in disciplinary proceedings, and students may attempt to demonstrate such bias with evidence about the university's investigation and adjudication procedures. *See Univ. of Ark.-Fayetteville*, 974 F.3d at 860, 864 (finding student stated a plausible claim the university discriminated against him on the basis of sex in disciplinary proceedings based in part with evidence about the adjudication decision); *Rossley*, 979 F.3d at 1192–94 (finding student failed to set forth sufficient evidence demonstrating the university's "decisions throughout the disciplinary process" were motivated by gender). The Eighth Circuit has not foreclosed students' Title IX claims under the cat's paw theory of liability. *See Univ. of Ark.-Fayetteville*, 974 F.3d at 869; *Rossley*, 979 F.3d at 1196. Here, Moe alleges Grinnell College's discriminated him on the basis of sex during the adjudication process as demonstrated by Ternus's allegedly

biased case opinion. The guidance set forth in Eighth Circuit cases shows Moe states a plausible theory of Title IX liability. Moe's claim may proceed.

The Court finds the cat's paw theory of liability does not apply to Moe's allegations in Count I. Moe does not allege a cat's paw theory of liability but sues Grinnell College alleging a viable theory of Title IX liability. Because Grinnell College moves for judgment on the pleadings on Count I only to the extent Moe seeks recovery under the cat's paw theory of liability, the Court finds Grinnell College is not entitled to judgment on the pleadings for Count I.

V. CONCLUSION

The cat's paw theory of liability does not apply to Moe's claims in Count I. Moe does not allege Ternus was a subordinate who used Grinnell College as a dupe to trigger discriminatory action. Moe alleges Grinnell College's disciplinary process as applied to him was infused with gender bias. He relies on Ternus's role as Grinnell College's Title IX adjudicator to support this allegation. The alleged facts taken as true are sufficient to support a plausible claim for relief. Grinnell College's motion for judgment on the pleadings on Count I fails.

IT IS ORDERED that Defendant Grinnell College's Partial Motion for Judgment on the Pleadings, ECF No. 29, is **DENIED.**

IT IS SO ORDERED.

Dated this 2nd day of June, 2021.

REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE