IN THE IOWA DISTRICT COURT FOR POLK COUNTY

EMILY BLACK, Plaintiff, v. STATE OF IOWA and ROBINETTE KELLY, individually and as an Iowa State University administrator, Defendants.	Case No. LACL139201 **DEFENDANTS' MOTION TO DISMISS**

Defendants State of Iowa and Robinette Kelley move to dismiss Plaintiff's petition per Iowa Rule of Civil Procedure 1.421. Plaintiff brings three claims: (1) equal protection under the Iowa Constitution, (2) negligence, and (3) premises liability. All three claims are time-barred and should be dismissed. In addition, all three claims should be dismissed on immunity grounds and/or for failure to state a claim on which relief can be granted. Plaintiff's equal protection claim should be dismissed because Chapter 216 provides an adequate and appropriate remedy and because Defendant Kelley is entitled to qualified immunity. Plaintiff's negligence claim should be dismissed because she fails to plead a cognizable claim and because Defendants are entitled to discretionary function immunity. In addition, Plaintiff's premises liability claim should be dismissed because Plaintiff alleges no facts—and her petition shows she could allege no facts—showing her injury was reasonably foreseeable to Iowa State. As a result, Defendants respectfully request that this Court dismiss Plaintiff's petition.

The Complaint

Plaintiff's petition is based on injuries she claims resulted from her reported rape in her dorm room at Iowa State University (ISU) and ISU's response to that reported rape. Plaintiff

alleges, in part, the following facts.[1] Plaintiff was raped by a friend in her dorm room at ISU in early October 2013. Plaintiff reported the rape to the ISU Police Department (ISU PD) on November 21, 2013. In early 2014, Plaintiff met with ISU's then-Director of its Office of Equal Opportunity, Defendant Kelley, for an initial interview. ISU PD and Kelley both investigated the case. On March 4, 2014, Plaintiff contacted ISU PD to let them know she wanted to proceed with a criminal case. ISU PD noted the case would be referred to the Story County Attorney's office for review. Story County determined it would not pursue charges.

In April 2014, Plaintiff withdrew from ISU. In July 2014, Kelley met with Plaintiff and told her that following the completion of the internal investigation the matter was being closed based on insufficient evidence. On September 2, 2014, Plaintiff participated in a follow-up meeting with ISU PD and others, after which Plaintiff received no further communication from ISU entities. In October 2014, Iowa State Police Chief Jerry Stewart forwarded information about the case to ISU's Office of Equal Opportunity and requested they review the case in light of that information. After meeting with Chief Stewart and ISU PD on March 15, 2015, Defendant Kelley declined to reopen Plaintiff's case, a decision ISU PD supported. On November 5, 2015, Plaintiff met with representatives from the Office of Equal Opportunity and learned that, contrary to her belief, her case had not been reopened. On January 9, 2017, Plaintiff submitted claims against the State of Iowa and Robinette Kelley to the State Appeal Board.

Based on these allegations, Plaintiff brings three claims: (1) violation of Article I, Section 6 of the Iowa Constitution, claiming Defendants deprived her equal protection of the law on the basis of her sex by failing to properly investigate her sexual assault case; (2) negligence, claiming Defendant Kelley negligently investigated Plaintiff's case and the State is liable for that

[1] Defendants dispute many or all of these facts, but present them as Plaintiff alleges them for the purposes of this motion.

negligence under *respondeat superior*; and, (3) premises liability against the State, claiming the State knew or should have known there was a significant danger student would be raped on their premises and negligently failed to take reasonable measures to protect Plaintiff from her rapist.

Analysis

I. All of Plaintiff's claims are barred by the two-year statute of limitations in Iowa Code § 669.13 and must be dismissed for lack of jurisdiction.

All three of Plaintiff's claims must be dismissed because they are time-barred on the face of the petition. *See Rieff v. Evans*, 630 N.W.2d 278, 289 (Iowa 2001) ("[W]hen it is obvious from the uncontroverted facts shown on the face of the challenged petition that the claim for relief was barred when the action was commenced, the defense may properly be raised by a motion to dismiss." (quotation marks omitted)). Plaintiff brings her suit under Iowa Code § 669.5(1), the Iowa Tort Claims Act (ITCA). Pet. ¶ 10. Under the ITCA, "a claim or suit otherwise permitted under this chapter shall be forever barred, unless within two years after the claim accrued, the claim is made in writing and filed with the director of the department of management under this chapter." Iowa Code § 669.13(1). Plaintiff alleges she submitted her claims to the State Appeal Board on January 9, 2017. Pet. ¶ 8. As a result, all claims accruing before January 9, 2015 are time-barred and must be dismissed for lack of jurisdiction. *See Segura v. State*, 889 N.W.2d 215, 224 (Iowa 2017) ("Under Iowa law it is well established the district court does not have jurisdiction to hear a tort claim against the state until it has been presented, properly, to the board.").

A claim "accrues" when the plaintiff "discovers the injury or by the exercise of reasonable diligence should have discovered it." *Nixon v. State*, 704 N.W.2d 643, 646 (Iowa

2005) (quotation marks omitted). Plaintiff's petition makes clear she discovered the injuries she complains of before January 9, 2015.

First, Plaintiff bases Count I—equal protection—on her allegation that ISU failed to properly investigate her sexual assault case, which she alleges damaged her by causing her to drop out of ISU in April 2014. The entire investigation and the damage Plaintiff claims all occurred before January 9, 2015. Plaintiff alleges ISU PD began investigating after she reported the assault to them in November 2013. She alleges Defendant Kelley began her investigation in early 2014. Plaintiff alleges Kelley met with her in July 2014 and told her that her case was being closed, and Plaintiff alleges that her last meeting or communication with ISU PD was in September 2014. Because both the acts Plaintiff complains of and the injury she claims she suffered occurred before January 9, 2015, and were known to her when they occurred, Plaintiff's equal protection claim is time-barred and must be dismissed.

Second, Plaintiff bases Count II—negligence—on her allegation that Defendant Kelley failed to thoroughly and completely investigate her report of rape and to assure her a safe environment on campus. Again, Plaintiff alleges that Kelley started her investigation in early 2014 and closed it in July 2014, informing Plaintiff at that time that her case was being closed. The acts she complains of—failure to properly investigate, failure to keep her apprised of the case, re-victimizing Plaintiff during their meetings, and failing to keep the accused away from Plaintiff during the investigatory period—all occurred in or before July 2014.[2] As a result, this claim is time-barred and must be dismissed.

[2] Plaintiff also complains that Kelley failed to reopen her case in 2015 after receiving additional information from Chief Stewart. To the extent Plaintiff seeks to sustain her negligence claim on this one allegation, she fails to state a claim because Defendants did not have a duty to re-open Kelley's closed investigation. In addition, Plaintiff does not allege that Chief Stewart provided new, previously-unavailable information to Kelley; rather, she alleges he sent a binder including phone transcripts and text messages from November and December 2013. Pet. ¶ 53.

Third, Plaintiff alleges in Count III—premises liability—that the State knew or should have known of a significant danger that students would be raped on their premises and negligently failed to take reasonable measures to protect Plaintiff from being raped. Plaintiff alleges she was raped in early October 2013. Pet. ¶ 11. She does not allege any later acts of assault. As a result, this claim is time-barred and must be dismissed.

II. Even if Plaintiff's equal protection claim is not time-barred, it still must be dismissed under *Godfrey v. State of Iowa* because Chapter 216 provides an adequate and appropriate remedy and because Defendant Kelley is entitled to qualified immunity.

a. Chapter 216 provides an adequate and appropriate remedy.

Even if Plaintiff's equal protection claim is not time-barred, it must be dismissed for failure to state a claim for which relief may be granted because Chapter 216 provides an adequate and appropriate remedy. Plaintiff's petition states she brings suit under Iowa Code § 669.5(1), the ITCA, and Plaintiff seeks damages for all claims. Under the Iowa Supreme Court's decision in *Godfrey v. State of Iowa*, Plaintiff's claim fails because the legislature has provided an adequate remedy for this claim in Chapter 216. *See* 898 N.W.2d 844 (Iowa 2017).

In *Godfrey*, the Iowa Supreme Court did not recognize a cause of action for all Iowa constitutional violations. Rather, four Justices explained that while a constitutional tort claim may be available when the legislature has not provided an adequate remedy, the Iowa Supreme Court would not recognize a tort claim under the Iowa Constitution when the legislature has provided an adequate remedy. *See id.* at 847, 880. A majority of the Court in *Godfrey* concluded that the district court properly dismissed the plaintiff's Iowa constitutional claims based upon equal protection principles because Chapter 216 provided an adequate remedy under the facts of

that case. *See id.* at 847, 876 (affirming dismissal of constitutional claims premised on sexual orientation because the remedies provided under Chapter 216 were adequate).

Following *Godfrey*, this Court should dismiss Plaintiff's constitutional claim based on equal protection principles because Chapter 216 provides an adequate remedy under the facts alleged. Plaintiff alleges Defendants were negligent in their handling of Plaintiff's complaint of sexual assault on ISU's campus and that, because rape disproportionately affects women, Defendants denied Plaintiff equal protection on the basis of sex by failing to properly investigate her sexual assault case or by failing to adhere to policies it had developed to "administer justice under these circumstances." Pet. ¶¶ 71-72. Plaintiff alleges Defendants' actions eventually caused her to drop out of ISU.

Iowa Code § 216.9 provides an adequate and appropriate remedy for this claim. Section 216.9 specifically addresses unfair or discriminatory practices in the education context. It prohibits discrimination on the basis of sex and defines discriminatory practices to include "[e]xclusion of a person or persons from participation in, denial of the benefits of, or subjection to discrimination in any academic, extracurricular, research, occupational training, or other program or activity." *Id.* § 216.9(1)(a). "[T]he remedies provided in the ICRA are robust," and here, as in *Godfrey*, "these remedies suffice as an adequate deterrent of any alleged unconstitutional conduct." *Godfrey*, 898 N.W.2d at 881 (Cady, C.J., concurring in part and dissenting in part). As a result, this Court should not recognize a constitutional claim in this case because there is already an adequate remedy under § 216.9. This Court should dismiss Plaintiff's equal protection claim.

b. Plaintiff's equal protection claim also must be dismissed because Defendant Kelley is entitled to qualified immunity.

Defendant Kelley is entitled to qualified immunity for her investigation. Qualified immunity protects government officials from suit when their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Sexton v. Martin*, 210 F.3d 905, 909-10 (8th Cir. 2000) (quotation marks omitted). In deciding whether an official is entitled to qualified immunity on a claim, courts address two questions: (1) whether the facts alleged show the officer's conduct violated a constitutional right, and (2) whether the right was clearly established at the time of the alleged violations. *Id.*

Plaintiff bases her equal protection claim on allegations that Kelley negligently investigated her report of sexual assault. As detailed above, Kelley's investigation took place in 2014, at which point it was not clearly established that Plaintiff could even bring a damages claim for an alleged violation of the Iowa constitution. Even assuming Plaintiff could have a constitutional right to have her report investigated in a particular manner, that right was not clearly established at the time of the alleged violation. As a result, Kelley is entitled to qualified immunity on this claim.

III. Even if Plaintiff's negligence claim is not time-barred, it must be dismissed because Defendants are entitled to immunity under the discretionary function exception.

In addition to being untimely, Plaintiff's negligence claim should also be dismissed because Defendants are immune from that claim under the discretionary function exception. The State of Iowa is immune from suit except as permitted by and to the extent permitted by statute. *Hansen v. State*, 298 N.W.2d 263, 265 (Iowa 1980). This immunity extends to claims brought against state employees in their official capacities. *Cf. Jones v. Univ. of Iowa*, 836 N.W.2d 127,

141 (Iowa 2013) ("[A]s long as the employee was acting within the scope of employment at all relevant times, the suit is deemed to be an action against the state."). Though Iowa Code § 669.4 waives the state's sovereign immunity from most tort claims, "[t]he State does not waive its sovereign immunity for actions 'based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion be abused.'" *Anderson v. State*, 692 N.W.2d 360, 364 (Iowa 2005) (quoting Iowa Code § 6694.14(1)). The Iowa Supreme Court uses a two-step test to determine whether a challenged action "falls within the discretionary function exception, and thus is entitled to statutory immunity from tort liability." *Id.* "The test requires the court to consider whether the action is a matter of choice for the acting employee and when the challenged conduct involves an element of judgment, to determine whether that judgment is of the kind the discretionary function exception was designed to shield." *Id*. The discretionary function exception "'protects only governmental actions and decisions based on considerations of public policy.'" *Id.* (quoting *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988)).

Plaintiff's petition claims negligence based on Kelley's discretionary choices in handling the investigation of Plaintiff's report of sexual assault, communicating with Plaintiff during that process, and in deciding whether to reopen the case after she had closed it. Plaintiff also alleges Kelley negligently failed "to keep Plaintiff's rapist away from her" and "to ensure that Plaintiff did not come into contact with her rapist during the investigatory period." Even if Plaintiff had otherwise pleaded a cognizable negligence claim—which she has not—all of these allegations are challenges to actions Kelley took in exercising her judgment and balancing various policy considerations, including ISU's obligation to provide a thorough and complete investigation of Plaintiff's report and its obligation to preserve the due process rights of the accused student

during the course of the investigation. Because Plaintiff's negligence claim only challenges Kelley's consideration and balancing of factors supported by public policy, Defendants are immune for Kelley's investigation of Plaintiff's case under the discretionary function exception. *Cf. Anderson*, 692 N.W.2d at 366-67 (explaining the State defendants were entitled to immunity under the discretionary function exception where a librarian engaged in the required public policy analysis, balanced the dangers of severe weather with library patrons' need for access to the library, and decided to keep the library open during severe weather).

IV. Even if Plaintiff's premises liability claim is not time-barred, it must be dismissed for failure to state a claim.

Even if Plaintiff had timely brought her premises liability claim, which she did not, it would fail because her petition does not allege—and shows she could not allege—that the injury caused to her by a third party was foreseeable to ISU or that ISU reasonably could have taken action to have protected Plaintiff. In Iowa, owners and occupiers have "only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Koenig v. Koenig*, 766 N.W.2d 635, 645-46 (Iowa 2009) (quotation marks omitted). One of the factors courts consider in evaluating a premises liability claim is the foreseeability or possibility of harm. *See id*. at 646 (detailing seven factors to consider in evaluating whether a landowner has exercised reasonable care for the protection of lawful visitors). The Iowa Supreme Court applies the Restatement (Third) of Torts in situations where a plaintiff seeks to hold a defendant liable for the actions of a third party. *See Brokaw v. Winfield-Mt. Union Cmty. Sch. Dist.*, 788 N.W.2d 386, 391 (Iowa 2010). As the Court has explained, "[t]he conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party." *Id.* (quotation marks omitted). "This section imposes liability where

the actions of the defendant increase the likelihood that the plaintiff will be injured on account of the misconduct of a third party." *Id*. (quotation marks omitted). Courts consider "the foreseeable likelihood of improper conduct on the part of the plaintiff or a third party," and "[w]here liability is premised on the negligent or intentional acts of a third party . . . the law itself must take care to avoid requiring excessive precautions of actors relating to harms that are immediately due to the improper conduct of third parties, even when that improper conduct can be regarded as somewhat foreseeable." *Id.* (quotation marks omitted).

Plaintiff alleges no facts whatsoever that suggest in any way that ISU had any knowledge or notice of misconduct by the accused in this case that would have made improper conduct on his part foreseeable. "A college, or any other kind of landlord, is incapable of foreseeing an acquaintance rape that takes place in the private quarters of a student or tenant, unless a specific student or tenant has a past history of such crimes." *Murrell v. Mt. St. Clare College*, 2001 WL 1678766, at *4 (S.D. Iowa 2001). Here, Plaintiff alleges no facts suggesting ISU knew or had any reason to know her alleged perpetrator posed a risk to her or anyone else. Plaintiff fails to allege any facts suggesting ISU knew or should have known rape was about to occur when it occurred. Plaintiff alleges no facts suggesting any action or inaction by ISU that combined with or permitted the accused's improper conduct. In fact, her petition does not include any allegations at all about ISU's actions before her rape or the circumstances surrounding her rape except that she was raped by a friend in her dorm room and that she later texted the accused and said "I said no to you and I passed out . . . I was clearly too drunk to defend myself and you should have known that by me saying no." Pet. ¶ 12.

Plaintiff's general and entirely unsupported allegation that the State knew of a general danger that students would be raped on their premises does not translate into a reasonably

foreseeable risk that Plaintiff's friend would assault her. Indeed, given the circumstances Plaintiff alleges, "it is unclear what steps [ISU] could have taken to protect [Plaintiff] from attack." *Facchetti v. Bridgewater Coll.*, 175 F.Supp.3d 627, 644 (W.D. Va. 2016); *see also Murrell*, 2001 WL 1678766, at *5 (explaining that for a college to "insure that students bring guests into their dorms that are unlikely to pose a threat, the College would have to prohibit guests altogether, or screen them intensively" which would result in an unacceptable "contravention of student autonomy and independence"). As a result, not only is Plaintiff's petition devoid of factual allegations that support her premises liability claim, but the allegations she alleges affirmatively show she cannot prove this claim. As a result, Plaintiff's premises liability claim should be dismissed for failure to state a claim.

Conclusion

All three of Plaintiff's claims fail as a matter of law. For these reasons, Defendants respectfully request that the Court dismiss Plaintiff's petition.

Respectfully submitted,

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Original filed electronically.
Copy electronically served to all parties of record

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon each of the persons identified as receiving a copy by delivery in the following manner on November 29, 2017:

- ☐ U.S. Mail
- ☐ FAX
- ☐ Hand Delivery
- ☐ Overnight Courier
- ☐ Federal Express
- ☐ Other
- ☒ EDMS System Participant (Electronic Service)

Signature: /s/AUDRA DRISH