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U. S. DISTRICT COURT
N. D. OF N. Y.

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OCT 3 2002

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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DAVID DONHAUSER,

Plaintiff,

AT _____ O'CLOCK _____ M
LAWRENCE K. BAERMAN, Clerk
UTICA

-v.-

9:01-CV-1535
(DNH)(GLS)

GLENN S. GOORD, Commissioner, NY DOCS; MARTHA
E. YOURTH, CSW Guidance Specialist; DOMINIC
MARTINELLI, Sex Offender Program Counselor; S.
CARTER, S.C.C., Oneida Corr. Facility,

Defendants.

=====

APPEARANCES:

OF COUNSEL:

FOR THE PLAINTIFF:

DAVID DONHAUSER
Plaintiff, *pro se*
99-B-1868
Oneida Correctional Facility
6100 School Road
Rome, New York 13440

FOR THE DEFENDANTS:

HON. ELIOT SPITZER
Attorney General of the
State of New York
Department of Law
The Capitol
Albany, New York 12224

NELSON SHEINGOLD, Esq

DAVID N. HURD, DISTRICT JUDGE

ORDER

Presently before this Court for review is a motion by the plaintiff David Donhauser ("plaintiff" or "Donhauser") for injunctive relief (docket no. 29). In addition, defendants have filed a motion requesting a protective order and stay of discovery

(docket no. 36).¹

I. Background

Plaintiff filed his complaint on October 10, 2001. In his *pro se* complaint, Donhauser claims that defendants are violating his constitutional rights under the First, Fifth and Fourteenth Amendments by requiring him to participate in a Sex Offenders Rehabilitation Program. Plaintiff alleges that as part of this program he will be required to set forth an account of his sexual history and claims that doing so will incriminate him. Further, Donhauser alleges that if he fails to participate in this program, defendants will withhold privileges from plaintiff.

On July 1, 2002, plaintiff filed a request for certification as a class action. Docket no. 23. Thereafter, on July 18, 2002, defendants filed a motion to dismiss. Docket no. 25. By Request and Order filed July 22, 2002, plaintiff's motion for certification of class action was stayed pending resolution of the motion to dismiss. Docket no. 27. On July 26, 2002, plaintiff filed a motion for injunctive relief. Docket no. 29. Thereafter, defendants filed an application to stay discovery until the motion to dismiss is resolved by this Court. Docket no. 36

2. Injunctive relief

The standard a court must utilize in considering whether to grant a request for injunctive relief is well-settled in this Circuit. As the Second Circuit noted in *Covino v. Patrissi*, 967 F.2d 73 (2d Cir. 1992), the movant must show: (a) irreparable harm and (b) either (1) a likelihood of success on the merits of the claim or (2) sufficiently serious

¹ Defendants have also filed a motion to dismiss which will be addressed in a separate order of this Court. Docket no. 25.

questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief. *Id.* at 77 (affirming district court's denial of inmate's request for preliminary injunction); see also *Roucchio v. LeFevre*, 850 F. Supp. 143, 144 (N.D.N.Y. 1994) (McAvoy, C.J.) (adopting Report-Recommendation of Magistrate Judge that denied inmate's request for injunctive relief).

(a) Irreparable harm.

As to this first factor, plaintiff requests that defendants be enjoined from "taking any action(s) in retaliation or in retribution against plaintiff for having filed and commenced the instant action." With respect to the plaintiff's allegations that defendants may harass or retaliate against Donhauser, the Court notes that allegations of future injury without more do not establish a real threat of injury. *Gibson v. Walker*, 95-CV-1649, (N.D.N.Y. December 7, 1995) (DiBianco, M.J.) (citing *Garcia v. Arevalo*, No. 93-CV-8147, 1994 WL 383238 (S.D.N.Y. June 27, 1994)). Donhauser's contention of threats and harassment without more are too speculative to establish irreparable harm.

Furthermore, Donhauser claims that defendants require inmates who participate in the sex offenders program to prepare a non-confidential biography and personal sexual history. Docket no. 29. Plaintiff requests that defendants be enjoined from the "current practice of requiring a detailed account of an [sex offender program] participant's personal sexual history, biography..." Docket no. 29 at 2.

The Supreme Court of the United States recently determined that loss of privileges, or similar disincentives, as a result of an inmate's failure to participate in a rehabilitation program for sex offenders, which includes preparing a sexual history, is

not unconstitutional. *McKune v. Lile*, ___ US ___, 2002 LEXIS 4206 (June 10, 2002). Thus, since the Supreme Court found that prison authorities do not violate an inmate's constitutional rights by enforcing consequences for that inmate's failure to participate fully in a sex offenders program. *Id.* at * 44. Donhauser's claim that defendants may transfer plaintiff or take away privileges as a result of his failure to participate in the sex offenders program does not establish irreparable harm.

- (b) Likelihood of success on the merits or sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the plaintiff.

In addition, a party is not entitled to injunctive relief unless there is also proof of a likelihood of succeeding on the merits of a claim, or evidence that establishes sufficiently serious questions going to the merits of the claim and a balance of hardships tipping decidedly toward the party seeking such relief. *See Covino*, 967 F.2d at 77.

In the present case, the plaintiff has submitted only his self serving affidavit and a memorandum of law containing the plaintiff's request for injunctive relief and the reasons why he believes his request should be granted. Donhauser failed to provide any relevant proof, such as documentation, affidavits from other inmates or counselors or any other credible evidence to support the allegations in his complaint. Therefore, the Court finds that Donhauser has failed to demonstrate to the satisfaction of this Court that he has either a likelihood of succeeding on the merits of his claims or sufficiently serious questions going to the merits of these claims and a balance of hardships tipping decidedly toward him. Therefore, since Donhauser failed to establish either of the two requisite elements discussed above, plaintiff's request for injunctive

relief is denied.

3. Stay of Discovery

Defendants have requested a stay of discovery pending resolution of their motion to dismiss. Docket no. 36. In deciding a motion to dismiss, the Court is limited to facts alleged on the face of the complaint and cannot consider proof outside the pleadings. See Fed. R. Civ. P. 12(b); see *also* generally 5 C. Wright & A. Miller, Federal Practice and Procedure § 1366 (1969 & Supp.1986). Therefore, discovery is not needed to oppose a motion to dismiss. In the event that the motion to dismiss is denied, plaintiff will then be afforded ample time to conduct discovery. Thus, defendants' request for a stay of discovery pending resolution of defendants' motion to dismiss is granted.

WHEREFORE, on the basis of the above, it is hereby

ORDERED, that plaintiff's motion for injunctive relief (docket no. 29) is denied, and it is further

ORDERED, that defendants' request for a stay of discovery pending resolution of defendants' motion to dismiss (docket no. 36) is granted, and it is further

ORDERED, that, if the motion to dismiss is denied, the Clerk forward this file to the Court for the setting of pretrial deadlines, and it is further

ORDERED, that the Clerk serve a copy of this Order on the parties by regular mail.

IT IS SO ORDERED.

Dated: October 2, 2002



David N. Hurd
U.S. District Judge