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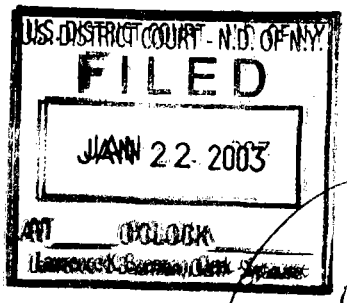

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DAVID DONHAUSER,

Plaintiff,

v.

Civil No. 9:01-CV-1535 (DNH/GLS)

GLENN S. GOORD, Comissioner, NYS Docs; MARTHA E. YOURTH, CSW Guidance Specialist; DOMINIC MARTINELLI, Sex Offender Program Counelor; and 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, NY 13440

FOR THE DEFENDANTS:

HON. ELIOT SPITZER
Attorney General State of New York
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Litigation Bureau
Albany, New York 12224-0341

NELSON SHEINGOLD, ESQ.
Asst. Attorney General

GARY L. SHARPE
U.S. MAGISTRATE JUDGE

REPORT-RECOMMENDATION

I. INTRODUCTION

This matter has been referred to the undersigned for a Report-Recommendation by the Honorable David N. Hurd, United States District Judge, pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.3(c). On July 19, 2002, the defendants filed a motion to dismiss (Dkt. Nos. 25-26). Plaintiff, *pro se*, David Donhauser ("Donhauser") has responded (Dkt. Nos. 43-44). For the foregoing reasons, the motion to dismiss should be granted.

II. Background[1]

Donhauser brings this action under 42 U.S.C. § 1983 claiming that the defendants violated his First, Fifth and Fourteenth[2] Amendment rights. Donhauser's complaint arises from his refusal to participate in the Sex Offender Program ("SOP"). This program requires Donhauser to take

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[1]On November 1, 2001, Donhauser was ordered to file an amended complaint by Judge Hurd. On March 21, 2002, his proposed first amended complaint was stricken from the record and Judge Hurd again asked Donhauser to file an amended complaint (*see Dkt. No. #10*). Judge Hurd noted that it appeared that Donhauser had not exhausted the administrative remedies available to him in the prison administrative process before commencing his lawsuit. (This court does not have access to a copy of the first amended complaint). In his second amended complaint, Donhauser does not state whether he exhausted his administrative remedies. Since the defendants do not address this issue, the court will also decline to do so.

[2]Donhauser does not specifically state that the defendants violated his Fourteenth Amendment rights, but this conclusion is appropriate after reviewing the complaint.

responsibility for his commission of sex crimes and discuss his sexual history as part of his participation.

III. Facts

In April of 2000, Donhauser was referred to the SOP at Oneida Correctional Facility. However, Donhauser did not want to admit his commission of the sex crime for which he was incarcerated. He claims that since he entered an Alford plea to the allegations charged, the program forces him to incriminate himself. He also claims that it would be a violation of his right to privacy to disclose his uncharged sex acts and family history. As such, Donhauser informed the prison officials that he would only participate in the program if he could maintain his innocence. Donhauser contends that as a result of his refusal to participate, the Parole Board denied him parole. In addition, he claims that he may face a possible future loss of good time credits for failure to participate in the program.

IV. Discussion

A. Legal Standard

Fed. R. Civ. P. 12(b)(6) provides that a cause of action shall be dismissed if a complaint fails "to state a claim upon which relief can be

granted." In analyzing a motion to dismiss, the facts alleged by a plaintiff are assumed to be true and must be liberally construed in the light most favorable to him. *See e.g., Easton v. Sundram*, 947 F.2d 1011, 1014-15 (2d Cir. 1991). While a court need not accept mere conclusions of law, it should accept the pleader's description of what happened along with any conclusions that can reasonably be drawn therefrom. *See Murray v. City of Milford*, 380 F.2d 468 (2d Cir. 1967). Furthermore, when a party makes a Rule 12(b)(6) motion, a court will limit its consideration to the facts asserted on the face of the complaint. *See Cosmas v. Hassett*, 886 F.2d 8, 13 (2d Cir. 1989). A complaint will not be dismissed for failure to state a claim unless it appears, beyond a reasonable doubt, that a plaintiff cannot prove any set of facts entitling him or her to relief. *See Wanamaker v. Columbian Rope Co.*, 740 F.Supp. 127 (N.D.N.Y. 1990). With this standard in mind, the court turns to the sufficiency of Donhauser's claims.

B. Fifth Amendment Claim

Donhauser claims that the SOP violated his Fifth Amendment privilege against self incrimination. Recently, the Supreme Court addressed this very issue in *McKune v. Lile*, 536 U.S. 24, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002). In that case, Robert Lile ("Lile"), a Kansas

inmate, refused to participate in the sex offender program because it required him to admit the commission of his sex crime and inform the authorities of his sexual history, including past uncharged sex crimes, without the benefit of immunity. Lile was informed that his refusal to participate in the program would automatically result in various privileges being reduced. Thereafter, Lile filed a 42 U.S.C. § 1983 action against the prison officials.

The Supreme Court held that "a prison clinical rehabilitation program, which is acknowledged to bear a rational relation to a legitimate penological objective, does not violate the privilege against self-incrimination if the adverse consequences an inmate faces for not participating are related to the program objective and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life". *McKune*, 536 U.S. at 27, 122 S. Ct. at 2027. The Court further held that "[d]etermining what constitutes unconstitutional compulsion involves a question of judgment: Courts must decide whether the consequences of an inmate's choice to remain silent are closer to physical torture against which the Constitution clearly protects or the *de minimis* harms against which it does not." *McKune*, 536 U.S. at 33, 122 S.

Ct. at 2028-9. Furthermore, the Court found that:

> It is proper to consider the nexus between remaining silent and the consequences that follow. Plea bargains are not deemed to be compelled in part because a defendant who pleads not guilty still must be convicted. States may award good-time credits and early parole for inmates who accept responsibility because silence in these circumstances does not automatically mean the parole board, which considers other factors as well, will deny them parole.

McKune, 536 U.S. at 38, 122 S. Ct. at 2030 (*internal citation omitted*). Furthermore, "[e]ven if a consequence follows directly from a person's silence, one cannot answer the question whether the person has been compelled to incriminate himself without first considering the severity of the consequences." *McKune*, 536 U.S. at 39, 122 S. Ct. at 2030. Lastly, the Court noted that "it is beyond doubt, of course, that [an inmate] would prefer not to choose between losing prison privileges and accepting responsibility for his past crimes. It is a choice, nonetheless, that does not amount to compulsion ...." *McKune*, 536 U.S. at 40, 122 S. Ct. at 2030.

In *Johnson v. Baker*, 108 F.3d 10, 12 (2d Cir. 1997), the Second Circuit determined that "participation in a rehabilitative program is itself a rational requirement for membership in the Family Reunion Program ("FRP")." In that case, an inmate was denied participation in the FRP since he refused to admit his guilt as part of the SOP because his direct

appeal was still pending. The court held that "inquiries seeking an inmate's admission to an alleged sexual offense are 'relevant' to the proper functioning of a rehabilitative program" and "an inmate who is unwilling to admit to particular criminal activity is unlikely to benefit from a rehabilitative process aimed at helping those guilty of that activity." *Johnson,* 108 F.3d at 11-12.

Moreover, it is settled law that an inmate does not have a constitutional right to parole. *See Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 7, 99 S. Ct. 2100, 2104, 60 L. Ed. 2d 668 (1979). The New York parole scheme is not one that provides any prisoner a legitimate expectation of release. *Barna v. Travis*, 239 F.3d 169, 170 (2d Cir. 2001). The State statute creates a parole board that has the power and the duty to determine "which inmates serving an indeterminate ... sentence of imprisonment may be released on parole ... and when." *Barna*, 239 F.3d at 170 (*citation omitted*).

Essentially, "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz*, 442 U.S. at 7, 99 S. Ct. at 2104. Moreover, the Second Circuit recently held that "plaintiffs have no liberty interest in

parole, and the protections of the due process clause are inapplicable." *Barna v. Travis*, 239 F.3d at 171 (2d Cir. 2001).

In this case, Donhauser claims that prison officials violated his right to be free from self-incrimination since the SOP required him to admit the commission of the sex crime which resulted in his incarceration, provide a family history and disclose prior uncharged sex acts. Donhauser also contends that his refusal to participate in the SOP caused his parole to be denied. The defendants maintain that Donhauser has not alleged any direct automatic causal consequence for his refusal to participate in the SOP. Moreover, they contend that Donhauser's complaint fails to allege any adverse consequences for his refusal. They argue that since there is no Fifth Amendment violation absent an automatic causal relationship and no action was taken against him, this case should be dismissed.

This court finds that Donhauser's Fifth Amendment rights were not violated. As the defendants have pointed out, Donhauser has not suffered any adverse action for his refusal to participate in the SOP. The defendants have not taken any action seeking to compel him to incriminate himself. While he summarily informs the court that his parole was denied for his refusal to participate in the SOP, this claim is equally

without merit. As *McKune* noted, the parole board must consider various factors when denying parole and Donhauser's refusal would not necessarily mean that they would deny him parole. Since there is nothing in the record which shows that Donhauser suffered any consequence in regards to his denial to participate in the SOP and there is no inherent right to parole, this court recommends the dismissal of Donhauser's Fifth Amendment claim.

B. Donhauer's Remaining Claims[3]

Donhauser claims that his refusal to participate may cause his good time credits to be taken away in violation of his due process and equal protection rights. He also claims that the disclosure of his past sexual history could result in new criminal charges filed against him, thereby prolonging his incarceration in violation of his right to privacy. The court notes that *pro se* complaints must be liberally construed. However, the Second Circuit has repeatedly held that "complaints relying on the civil rights statutes are insufficient unless they contain some specific allegations of fact indicating a deprivation of rights, instead of a litany of

[3]Donhauser claims that his equal protection rights were violated. In *Johnson*, 108 F.3d at 11, the Second Circuit held that there was "no basis" for an equal protection claim under similar circumstances. Accordingly, this court also finds no basis for an equal protection claim and recommends dismissal.

general conclusions that shock but have no meaning." *Barr v. Abrams*, 810 F.2d 358, 363 (2d Cir. 1987).

This court finds that Donhauser has failed to state specific allegations of fact indicating that a deprivation of rights has occurred. Moreover, a "possible loss of good time credits" claim is hypothetical and also fails to show that Donhauser's rights were violated by the defendants. Accordingly, this court recommends the dismissal of all of Donhauser's claims since he has failed to state a claim for which relief can be granted.

WHEREFORE, for the foregoing reasons, it is hereby

RECOMMENDED, that the defendants' motion to dismiss (Dkt. No. 25) be **GRANTED** since Donhauser fails to state a claim for which relief can be granted under the Fifth Amendment; and it is further

RECOMMENDED, that the defendants' motion to dismiss (Dkt. No. 25) be **GRANTED** since Donhauser's claims under the First and Fourteenth Amendments fail to state a claim for which relief can be granted; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Report-Recommendation upon the parties by regular mail.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge

written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court within **TEN** days. **FAILURE TO SO OBJECT TO THIS REPORT WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

Dated: January 22, 2003
Syracuse, New York

GARY L. SHARPE
U. S. MAGISTRATE JUDGE