IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DEREK S. KRAMER,

Plaintiff,

v.

WISCONSIN DEPARTMENT OF CORRECTIONS, RICK RAEMISCH, WILLIAM POLLARD, DENNIS MOSHER, PETER HUIBREGTSE and MICHAEL DONOVAN,

Defendants.

ORDER

10-cv-224-slc

Plaintiff Derek Kramer is an adherent of Odinism, a polytheistic religion that began in Northern Europe more than 7000 years ago. (The parties also refer to the religion as Asatru, but they agree that there are no relevant distinctions between the two, so for simplicity's sake, I will use the name Odinism.) Plaintiff contends that prison officials at the Green Bay Correctional Institution (where he was housed in 2007 and 2008) refused to allow him to engage in group study or worship devoted exclusively to his own faith and refused to allow him to possess various items associated with Odinism, in violation of the free exercise clause, the establishment clause and the equal protection clause. In addition, he contends that officials at the Wisconsin Secure Program Facility (where he is housed now) are refusing to allow him to keep a Thor's Hammer emblem while he is in segregation, in violation of the free exercise clause and Religious Land Use and Institutionalized Persons Act, the equal protection clause and the establishment clause.

Defendants have moved for summary judgment on all of plaintiff's claims, with the exception of those he raised under the establishment clause. *See* dkt. 46. (The court allowed plaintiff to raise claims under an establishment clause theory after granting plaintiff's motion for reconsideration, dkt. 21, so it may be that defendants simply overlooked those claims.) In their

motion, defendants argue that plaintiff has failed to show that his religious exercise has been substantially burdened, that the limitations on plaintiff's religious exercise are reasonably related to legitimate penological interests in maintaining security and preserving resources and that they are entitled to qualified immunity. Alternatively, they argue that plaintiff is limited to nominal damages with respect to his claims that arise out of events at the Green Bay prison and that defendant Rick Raemisch should be dismissed from the case because he was not personally involved in any of the alleged violations.

I am granting defendants' motion with respect to all claims except for plaintiff's claims that (1) defendants William Pollard and Dennis Mosher discriminated against him by denying his request for a hlath and (2) defendants Wisconsin Department of Corrections and Peter Huibregtse are refusing to allow him to keep a Thor's Hammer while in segregation. (Although DOC cannot be sued under § 1983, defendants do not deny that it may be sued under RLUIPA. 42 U.S.C. § 2000cc-2(a); 42 U.S.C. § 2000cc-5(4).) With respect to those claims, defendants have failed to provide any justification for denying plaintiff's requests but allowing other prisoners to keep similar items.

Also before the court is defendants' motion to "strike" several affidavits submitted by plaintiff. *See* dkt. 79. I am denying this motion as academic because the court did not need to consider the disputed evidence in order to resolve defendants' motion for summary judgment.

From the parties' proposed findings of fact and the record, I find that these facts are undisputed:

UNDISPUTED FACTS

Plaintiff Derek Kramer is incarcerated at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. From December 21, 2007 to October 10, 2008, plaintiff was housed at the Green Bay Correctional Institution

Plaintiff's Religious Beliefs

Odinism was the native religion and spiritual belief system of the Northern European people before their conversion to Christianity. Odinism is more than 7,000 years old. After centuries of dormancy, practice of Odinism was revived in the early 1900's in Continental Europe and Scandinavia. The term Asatru is Icelandic and describes the practices of the Scandinavian belief systems while the term Odinist reflects a more Continental European view in their belief systems.

Odinists believe in the Aesir and Vanir Gods and Goddesses of the Northern European people. Because Odinism is classified as an earth religion, the needs and practices are somewhat similar to the Native Americans, Wiccansm Theodish and other similar earth-based faiths.

Blots and Sumbels are religious services performed by Odinists. Plaintiff believes that "Blot is a fundamental part of Odinism," that "Blots are performed in a congregated group of Odinist[s] followed by a Sumbel," Plt.'s Decl. ¶ 26, dkt. 63, and that "it is a fundamental part of Odinism to perform a monthly Blot (followed by a Sumbel) on a Holy Day." *Id.* at ¶ 27.

Policies Related to Prison Religious Exercise

DAI Policy and Procedure 309.61.01 establishes the concept of "umbrella religion groups," which are defined as "inclusive groups designed to appeal to a wide range of religious beliefs within a given faith group." These groups are "Protestant," "Catholic," "Jewish," "Islam," "Native American," "Eastern Religions" and "Pagan." Both Odinism and Wicca are included in the Pagan group. Like Wicca, Odinism is an "earth religion," so the "needs and practices" of the adherents of the two religions "are somewhat similar."

DAI Policy 309.61.02 addresses the subject of religious property and includes a "Religious Property Chart." The chart itemizes the religious items that a prisoner may possess while incarcerated in a Wisconsin prison. The chart does not purport to limit the religious items a prisoner may possess to only those items listed in the chart. In other words, the chart establishes a floor but not a ceiling.

The chart says that members of each group may possess one of several preapproved religious emblems. With respect to the pagan group, the chart lists the following items: Oghan-rectangular, Triangle pendant, Triskele-3 circles connected, Pentagram and Thor's Hammer. Other items approved for individual use by pagans are oil, the "Book of Shadows," a feather, a reflective service and tarot cards. For group use, the Pagan group may use a bell, a cauldron, a chalice, incense, a pentagram, salt and pentacle dish, wooden wand, baptistry, communion ware, communion bread and a "cross/crucifix." The "Book of Shadows" has no religious significance for plaintiff.

Individual members of any umbrella group may possess a calendar, an emblem lanyard, "religious books/publications," and "religious art." For group use, all umbrella religions are

allowed to use the following items: an electric or wax candle and holder, "audio/videotapes," "electronic equipment," "altar paraments," "available musical instruments," "table/altar," "lectern/podium," a stand for religious books and wine.

The Thor's Hammer emblem is the only item on the chart that is specifically for Odinists. In the Religious Property Chart in effect until 2002, all of the items that are classified now as "Pagan" were classified as "Wiccan," with the exception of Thor's Hammer, which was not approved and therefore not on the list at all at that time.

Study books, like any book, may be ordered by a prisoner and the books are then reviewed for security risks. Until a book is ordered by the prisoner and received at the prison, it cannot be approved or denied.

Plaintiff's Opportunities for Religious Exercise

At the Green Bay prison, prisoners are not permitted to lead or conduct a religious service or study group. Rather, they are led by the chaplain or an approved volunteer from outside the prison. However, defendant Michael Donovan (the prison chaplain) allows the Native American group to hold a "pipe and drum" service without a volunteer. Odinist prisoners at WSPF are permitted to hold congregate services without a volunteer.

James Riggs has been an approved volunteer at the Green Bay prison. Each year the Pagan group ritual feast includes a Sumbel, which is a ritual for Odinists.

Beginning in February of 2010 the group spent four sessions covering Odinist philosophies, a breakdown of the deities, ideals and practices of Odinism. Near the end of summer 2010, the group spent another four weeks studying the Havermal, part of the Odinist

sacred texts. In this same year, the group also spent two weeks discussing the Nine Noble Virtues of Odinism.

All religious property in the prison chapel is donated. The prison chapel includes a "manual" on Odinism that was written by a volunteer for the Pagan group.

Defendant Donovan has informed Odinist prisoners that they may seek donations from Odinist organizations for religious materials, and they may order their own publications related to Odinism.

Plaintiff's Requests for New Religious Practices and Items

If a prisoner wishes to participate in a religious practice or activity that is not offered at his prison and that involves other prisoners or affects his personal appearance or the operation of the prison, then he must prepare and submit from DOC-2075, "Request for New Religious Practice." He must use the same form if he wishes to request permission to possess a religious item that is not included on the "Religious Property Chart." The request is reviewed by defendant Donovan (the prison chaplain), defendant Dennis Mosher (the program supervisor), the Religious Practices Advisory Committee and defendant William Pollard (the warden), who makes the final decision.

In May 2008 plaintiff filled out multiple forms called "Request for New Religious Practice" and submitted them to the prison chaplain. In one form, plaintiff asked for permission to form a group for "practicing or studying the [Odinist] faith." He identified various objects that he said the group would need:

(1) an altar for use in religious ceremonies;

(2) an altar cloth;

(3) "a blessing bowl";

(4) a ritual drinking horn;

(5) candles;

(6) a rune staff;

(7) a Thor's Hammer;

(8) mead;

(9) images of Gods;

(10) an oath ring;

(11) an evergreen twig; and

(12) a sun wheel.

In another form, he asked for permission to possess a set of runes, rune cards, "runic study books" and a hlath for private worship.

Runes are symbols used by adherents of Odinism to communicate and express ideas and concepts. Runes are not allowed at the prison unless they are written by the prisoner in the "Book of Shadows" or are printed in approved publications. A hlath is a type of head garment.

With respect to plaintiff's request for group worship, defendant Donovan concluded that the Pagan group was sufficient to meet plaintiff's needs. In addition, he noted that an "approved outside leader" would be needed for any group worship. He did not consider any of the items plaintiff said he needed for group worship. Defendant Mosher wrote that "[t]he seven umbrella religious groups established by the Department of Corrections [are] in keeping with religious coverage for all inmates. Staffing[,] space and overall institutional resources necessitate

our current policies while providing religious services for all inmates." Defendant Pollard denied the request without comment.

With respect to plaintiff's requests for the various items, defendant Donovan wrote that runes created a security concern because prisoners might believe that the runes could be used to cast spells and because they could be used as a form of code. However, he wrote that he "f[ou]nd no problem" with plaintiff's request for a hlath "as long as it is black only" because it is similar to a yarmulke or kufi. In addition, he recommended that a "Personal Journal or Workbook" be substituted for the "Book of Shadows" on the Religious Property Chart because "[i]t is Wiccans, mostly, who use a Book of Shadows." Donovan did not address plaintiff's other property requests. Defendant Mosher agreed that runes "could be contrary to the safety/security of the institution" but that but that "the issue of 'hlaths' or headbands needs to be addressed by itself." In addition, he did not object to substituting a "Personal Journal" for the "Book of Shadows." Defendant Pollard denied all requests without comment.

Prisoners are allow to write to other prisoners in Spanish, Hebrew or Arabic.

Muslims are allowed to wear kufi caps and Jews are allowed to wear yarmulkes, even in segregation.

Religious Exercise in Segregation at the Wisconsin Secure Program Facility

The placement of a prisoner in segregation status is DOC's response to the prisoner's inability to follow DOC's disciplinary rules. It removes the individual from the general population and in doing so, restricts the individual's freedom of movement, property and access to services, programs and privileges. Prisoners housed in segregation include those who present

a substantial risk to another person, self or institution security as a result of their behaviors or history of homicidal, assaultive or other violent behavior. To diminish the risk that prisoners in segregation will misuse property items to create instruments of escape or weapons, strict limits must be placed on allowable property for prisoners in segregation.

Prisoners in segregation may possess up to four paperback books or publications. Generally, "religious emblems" are not allowed in segregation unless they are made of paper or cloth. Prohibited items include a Thor's hammer, crucifix and Star of David. However, prayer beads, rosaries and medicine bags are not classified as "religious emblems." Prayer beads are permitted if they are made of wood or plastic and beads that are no larger than ½ inch in diameter. The medicine bag must be three inches or less in diameter, sewn shut and weigh less than two ounces. A rosary must be no longer than 45 inches, made of wood or plastic and have beads that are no more than ½ inch in diameter. DOC regulations do not limit the size of the cross attached to the rosary.

In addition to a paper or cloth emblem, segregation prisoners classified as Pagan may possess the following items: (1) a paperback copy of the "Book of Shadows"or a personal journal; (2) a one ounce plastic bottle of frankincense, ferdous, sandalwood or somali rose; (3) pictures of signs or symbols of their religion.

Plaintiff believes that his Thor's Hammer protects him from "ill will." He uses it to "hallow [his] own... space" and "consecrate food and drink."

OPINION

I. Background Law

A. Summary Judgment Standard

Summary judgment is proper where there is no showing of a genuine issue of material fact and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party. *Johnson v. Manitowoc County*, 635 F.3d 331, 334 (7th Cir. 2011). In determining whether a genuine issue of material facts exists, the court must construe all facts in favor of the nonmoving party and all reasonable inferences are drawn in his favor. *Ault v. Speicher*, 634 F.3d 942, 945 (7th Cir. 2011). Even so, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The party that bears the burden of proof on a particular issue may not rest on its pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires a trial. *Hunter v. Amin*, 538 F.3d 486, 489 (7th Cir. 2009). In a § 1983 claim, the plaintiff bears the burden of proof on the constitutional deprivation that underlies the claim, and thus must come forward with sufficient evidence to create genuine issues of material fact to avoid summary judgment. *Ault v. Speicher*, 634 F.3d at 945.

B. Personal Involvement

A prison official may not be held liable under § 1983 unless he was personally involved in the constitutional violation, which means that he or she "must know about the conduct and

facilitate it, approve it, condone it, or turn a blind eye." *Johnson v. Snyder*, 444 F.3d 579, 583-84 (7th Cir. 2006) (internal quotations omitted). In other words, a § 1983 plaintiff must connect the violation to the named defendants. *Delapaz v. Richardson*, 634 F.3d 985, 899 (7th Cir. 2011). A defendant may not be held liable simply because he supervised others who violated the plaintiff's rights. *Burks v. Raemisch*, 555 F.3d 592, 593-94 (7th Cir.2 009) ("Liability depends on each defendant's knowledge and actions, not on the knowledge or actions of persons they supervise."). Both sides assume that the personal involvement requirement applies to RLUIPA as well, so I will assume it as well. *Accord Pilgrim v. Artus*, 9:07–CV–1001, 2010 WL 3724883 at *14 (N.D.N.Y. March 18, 2010) (RLUIPA claims include personal involvement requirement); *Joseph v. Fischer*, 08 Civ. 2824, 2009 WL 3321011, at *18 (S.D.N.Y. Oct. 8, 2009) (same); *Hamilton v. Smith*, 9:06–CV–805, 2009 WL 3199520, at *9 (N.D.N.Y. Sept. 30, 2009) (same); *Jacobs v. Strickland*, 2009 WL 2940069, at *2 (S.D. Ohio Sept. 9, 2009) (same).

Defendants argue that defendant Raemisch must be dismissed because he had no personal involvement in any of the alleged constitutional violations. (Defendants do not question the personal involvement of any other defendant, so I limit consideration of this issue to Raemisch.) In particular, they say that he did not make or approve any of the decisions that plaintiff is challenging in this case. Although plaintiff argues that Raemisch should remain in the case, he does not cite any evidence to prove Raemisch's involvement.

Accordingly, I am granting the state's motion for summary judgment as to defendant Raemisch.

II. Free Exercise Claims at the Green Bay Prison

A. Standard of Review

The first question is the appropriate standard of review. Generally, claims brought by prisoners under the First Amendment are governed by the standard from *Turner v. Safley*, 482 U.S. 78 (1987), which asks whether the restriction is reasonably related to a legitimate penological interest. However, in the context of claims brought under the free exercise clause, some cases suggest that courts must answer other questions as well, including: (1) whether the plaintiff's claim involves "religious" beliefs that are "sincere"; (2) whether defendants placed a "substantial burden" on the plaintiff's exercise of religion; (3) whether the plaintiff's claim involves a "central religious belief or practice"; and (4) whether the restriction targets the plaintiff's religion for adverse treatment or is a neutral rule of general applicability. This court or the court of appeals has treated one or more of these issues as an element in some past cases brought by prisoners, *e.g.*, *Borzych v. Frank*, 2006 WL 3254497, *4 (W.D. Wis. 2006) (requiring all of these elements), but in other prisoner cases at least some of the elements have been ignored. *E.g., Ortiz v. Downey*, 561 F.3d 664, 669 (7th Cir. 2009) (applying *Turner* without discussing other elements). *See also Mayfield v. Texas Dept. of Criminal Justice*, 529 F.3d 599, 608 (5th Cir. 2008) (applying *Turner* to claims brought by Odinist prisoners without imposing other requirements).

Defendants concede that Odinism is a religion entitled to protection under the free exercise clause, *e.g.*, *Borzych v. Frank*, 439 F.3d 388, 390 (7th Cir. 2006), and they do not challenge the sincerity of plaintiff's religious beliefs for the purpose of their motion for summary

judgment, so I need not consider the scope of that requirement. Both sides discuss the issues raised in questions (2), (3) and (4).

All three originate with the Supreme Court's evolving case law interpreting the free exercise clause. Before 1990, "[t]he free exercise inquiry ask[ed] whether government ha[d] placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifie[d] the burden." *Hernandez v. CIR*, 490 U.S. 680, 698-99 (1989). However, in *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Court held that the free exercise clause does not prohibit the government from burdening religious practices through generally applicable laws and it rejected the plaintiffs' claim that the government violated their rights by prosecuting them for using peyote as part of a religious ceremony. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993), the Court struck down a law that prohibited the sacrifice of animals for religious purposes, stating that, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."

These three cases present three possible standards for judging free exercise claims: (1) the plaintiff must show *only* that the defendant discriminated against his religion (*Smith* and *Lukumi* supplanted the "substantial burden" and "central tenet" requirements); (2) the plaintiff must show that the defendant discriminated against his religion *and* that the defendant placed a substantial burden on his religious exercise (*Smith* and *Lukumi* imposed an additional element that must be proven along with the "substantial burden" and "central tenet" requirements); or (3) the plaintiff must prove that the defendant discriminated against his religion *or* that

defendant substantially burdened plaintiff's religious exercise (*Smith* and *Lukumi* created an alternative method for proving a violation of the free exercise clause).

On their face, *Smith* and *Lukumi* seem to suggest that the first option is the right one. In *Lukumi*, the Court found a violation of the free exercise clause without discussing whether the law at issue imposed a substantial burden on the plaintiffs' religious exercise. Regarding the effect of the restriction on the plaintiffs' religious exercise, the Court said only that "[n]either the city nor the courts below . . . have questioned the sincerity of petitioners' professed desire to conduct animal sacrifices for religious reasons." *Lukumi*, 508 U.S. at 531. In *Smith*, the Court seemed to repudiate the view that the federal judiciary should be determining how important a particular religious exercise is. *Smith*, 494 U.S. at 886-87 (discussing inherent difficulties of determining scope of religious mandates). Some cases in this circuit seem to support a reading that the only relevant issue under the free exercise clause is whether the restriction is neutral. *E.g., Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 763 (7th Cir. 2003) (applying *Smith* and *Lukumi* and ignoring substantial burden test); *Sasnett v. Sullivan*, 91 F.3d 1018, 1020 (7th Cir. 1996) ("After *Smith* the only way to prove a violation of the free-exercise clause is by showing that government discriminated against religion, or a particular religion, by actually targeting a religious practice, rather than hit it by accident while aiming at something else.").

However, *Smith* and *Lukumi* do not foreclose the second interpretation. Although the Court did not say in either case that the plaintiff still must prove that his religious exercise was substantially burdened, it may have been unnecessary to answer that question because it was undisputed that a substantial burden had been imposed on the plaintiffs. In at least one case,

the court of appeals included in its discussion of the free exercise clause the "substantial burden" test and the "neutrality" test. *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 631 (7th Cir. 2007). This case may suggest that plaintiffs must show both a substantial burden *and* religious discrimination to make out a claim under the free exercise clause. That is the view this court has taken in several cases. *E.g.*, *Jackson v. Raemisch*, 726 F. Supp. 2d 991, 998-1000 (W.D. Wis. 2010) (Conley, J.); *Borzych*, 2006 WL 3254497, at *4 (Crabb, J.).

Some cases cite the "central tenet" requirement as well, but generally do so in passing without relying on it or considering its continuing viability. *St. John's*, 502 F.3d at 631; *Fleischfresser v. Directors of School Dist. 200*, 15 F.3d 680, 689-90 (7th Cir. 1994). I agree with plaintiff that in *Smith* the Court did away with the "central tenet" requirement, so I will not discuss it further. *Smith*, 494 U.S. at 886-87 ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field.").

In some cases, the court of appeals seems to suggest that a party may prove a free exercise violation with evidence of a substantial burden *or* a discriminatory rule. For example, in *Vision Church v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006), the court summarized the standard under the free exercise clause as follows:

> The relevant inquiry is two-fold. First, we examine whether the law being challenged is neutral and of general applicability. If not, it must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. This does not end the inquiry, however: A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of

> religion, in which case there must be a compelling governmental interest justifying the burden.

Id. at 996 (internal quotations, citations and brackets omitted). *See also St. John's*, 502 F.3d at 644 (Ripple, J., concurring in part and dissenting in part) ("First, a law that burdens the free exercise of religion and that is not facially neutral and of general applicability will be subject to strict scrutiny. Second, a facially-neutral law that imposes a substantial burden on religion offends the Free Exercise Clause and likewise is subject to strict scrutiny.") (internal quotations and citations omitted).

In *World Outreach Conference Center v. City of Chicago*, 591 F.3d 531, 534 (7th Cir. 2009), the court stated that the plaintiff need not show a substantial burden on his religious exercise if he can show religious discrimination instead: "If a state or local government deliberately discriminated against a religious organization (or against religion in general), it would be violating the free exercise clause even if the burden that the discrimination imposed on the plaintiff was not 'substantial.'" Although that statement could be read as supporting the third interpretation ("substantial burden" and "neutrality" tests are alternatives), it also could be read to mean simply that "substantial burden" no longer is part of the test under the free exercise clause.

A fourth set of cases simply applies the "substantial burden" test without noting *Smith* or *Lukumi*. *Nelson v. Miller,* 570 F.3d 868, 877 (7th Cir. 2009)("Section 1983 First Amendment [free exercise] claims . . . use the substantial burden test to determine whether a violation of a plaintiff's religious free exercise rights has occurred."); *Fleischfresser*, 15 F.3d at 689-90 (applying substantial burden test without noting neutrality test).

The third and fourth groups of cases seem inconsistent with *Smith* and with other appellate decisions that repeat the view from *Smith* that a neutral rule is valid regardless of the burden it imposes. *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, 130 S. Ct. 2971, 2995 n.27 (2010) (*Smith* "forecloses" claim under free exercise clause if plaintiff "seeks preferential, not equal, treatment"); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) ("[T]he Constitution does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws."); *Borzych*, 439 F.3d at 390 ("The first amendment . . . does not require the accommodation of religious practice: states may enforce neutral rules."). However, because the court of appeals seems to have adopted different standards in different cases, it is not clear which standard this court should follow.

Narrowing the exegesis to cases involving prisoners does not help because the standard is unclear within this subset. In one of its first cases about religion in prison, the Supreme Court seemed to adopt a test similar to *Smith* when it stated that prison officials violated the free exercise rights of a Buddhist prisoner "if he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts." *Cruz v. Beto*, 405 U.S. 319, 322 (1972). However, three years before *Smith*, in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), the Court adopted the *Turner* test for prisoner claims brought under the free exercise clause. The Court did not discuss whether a prisoner must show as a threshold matter that his religious exercise was substantially burdened, although it noted that "[t]here is no question that respondents' sincerely held religious beliefs compelled attendance at Jumu'ah." *Id.* at 345. Since *O'Lone*, the Supreme Court has not decided another prisoner case under the free exercise clause.

As in the nonprisoner cases, the court of appeals seems to have applied varying standards to prisoners' free exercise claims. In one case, the court of appeals considered whether *Turner* or *Smith* supplied the appropriate standard but declined to decide because on the facts, both tests produced the same result. *Sasnett v. Litscher*, 197 F.3d 290, 292 (7th Cir. 1999), *overruled on other grounds by Bridges v. Gilbert*, 557 F.3d 541 (7th Cir. 2009). Since *Sasnett*, the court has not explicitly addressed the issue, but instead has applied one standard or another without discussion. *Compare Borzych*, 439 F.3d at 390 (assuming that *Smith* applies to prisoner claims), *and Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008) (same), *with Kaufman v. McCaughtry*, 419 F.3d 678, 682-83 (7th Cir. 2005) (applying combination of *Turner* test and substantial burden test), *with Conyers v. Abitz*, 416 F.3d 580, 585 (7th Cir. 2005) (applying *Turner* test only) *and Tarpley v. Allen County, Indiana*, 312 F.3d 895, 898-99 (7th Cir. 2002) (same). *See also Boles v. Neet,* 486 F.3d 1177, 1182 (10th Cir. 2007) (noting different views held among the circuits regarding appropriate standard on free exercise claims brought by prisoners).

One might argue that both the "neutrality" test and the "substantial burden" test are taken into account under *Turner.* The first *Turner* factor is whether there is "a valid, rational connection between the prison regulation and the legitimate and *neutral* governmental interest put forward to justify it." *Shaw v. Murphy*, 532 U.S. 223, 229 (2001) (emphasis added) (internal quotations and brackets omitted). At least one court has treated the neutrality requirement under *Turner* as incorporating a principle similar to that in *Lukumi*. *Mayfield*, 529 F.3d at 609. Under the second *Turner* factor, the court must determine whether "alternative means of exercising the right . . . remain open to prison inmates," *Turner*, 482 U.S. at 90, which could be similar to a determination whether a restriction imposes a substantial burden on

religious exercise. However, because *Turner* is a factor test (no one factor is necessarily dispositive) and the other tests involve elements, the issue is not necessarily resolved by applying *Turner* only.

Further guidance on the correct standard from the court of appeals in the appropriate case would be useful. Although Supreme Court case law suggests that the "substantial burden" requirement may have been jettisoned, I am reluctant to omit that element in light of the Seventh Circuit case law that applies it. Further, although *Smith* seems to impose a "neutrality" element on all free exercise claims, I am reluctant to say that it applies when the last court of appeals decision on the issue held that it is an open question whether *Smith* applies to prisoner cases.

Therefore, I will assume for the purpose of deciding defendants' motion that plaintiff must satisfy the *Turner* test and prove both that defendants substantially burdened his religious exercise and that the restriction is discriminatory. The parties seem to assume that all of these requirements apply and making this assumption will not change the outcome of this opinion.

B. Group Worship

(1) Substantial burden

The court of appeals has defined a "substantial burden" on free exercise rights in different ways. In *Civil Liberties for Urban Believers*, 342 F.3d at 761, the court stated that a "substantial burden" is "one that necessarily bears a direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." In *Koger*, 523 F.3d 789, the court quoted language from *Thomas v. Review Bd.*, 450 U.S. 707 (1981), that government conduct is

substantially burdensome "when it puts substantial pressure on an adherent to modify his behavior and violate his beliefs," and language from *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996), that "a substantial burden on the free exercise of religion . . . is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs." In *Nelson*, 570 F.3d at 878, the court cited the definition from both *Civil Liberties for Urban Believers* and *Thomas.* Presumably, the court of appeals believes that a showing under any of these definitions is sufficient.

Both sides to some extent rely on testimony of third parties in their attempts to show that plaintiff's religious exercise was–or was not–substantially burdened by being unable to engage in group worship specific to Odinism. In their proposed findings of fact and in a separate motion, dkt. 79, the parties debate the admissibility of the affidavits of Laurel M. Owen and Valguard Murray, dkt. 63-9, 63-11, 64 and 65, two witnesses offered by plaintiff who discuss various aspects of Odinism. In particular, defendants argue that although Owen and Murray are testifying as experts, plaintiff did not follow the requirements of Fed. R. Civ. P. 26; therefore, this court should strike their testimony. Plaintiff denies that Owen and Murray are experts, but if this is true, then it is not clear what purpose their testimony serves because their personal beliefs have no relevance to this case.

I need not dwell on the admissibility of the affidavits because I am not persuaded that expert testimony is required or even appropriate when determining whether defendants have imposed a substantial burden on plaintiff's religious exercise, at least for the purpose of summary judgment. Defendants cite *Borzych*, 439 F.3d at 390, in which the court noted that the prisoner

failed to cite any "objective evidence" to "suppor[t] his assertion that" the items he requested were "important" to his religion. The court concluded that a prisoner's "unreasoned say-so, plus equivalent declarations by other inmates" are "insufficient to create a material dispute that would require a trial" on the question whether the prisoner's religious exercise was substantially burdened.

Borzych is best read as a rejection of conclusory allegations in the context of a motion for summary judgment rather than a holding that expert testimony is required in a free exercise case. The latter reading would be contrary to other cases in which both the Supreme Court and the court of appeals have admonished parties for focusing on the question of what a particular religion "requires" or "mandates." For example, in *Thomas*, 450 U.S. at 715-16, the Court stated that "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation." Similarly, in *Ortiz*, 561 F.3d at 669, the court stated that it could not dismiss a claim under the free exercise clause simply because a particular religious authority concluded that an item or practice was "not vital to worship," holding that a "person's religious beliefs are personal to that individual; they are not subject to restriction by the personal theological views of another." *See also Koger*, 523 F.3d at 803 ("[T]he prison officials employed a clergy-as-arbiter-of-orthodoxy standard that ha[s] long been rejected."); *Rust v. Clarke*, 883 F. Supp. 1293, 1306-07 (D. Neb. 1995) ("[T]his court is simply not suited to announce the 'correct' interpretation of Asatru religious literature or the 'proper' way to practice the Asatru religion.").

Under these cases, the question is not whether prison officials prevented the plaintiff from practicing a religion as defined by a particular religious expert, but whether they

substantially burdened the prisoner's *personal* religious exercise. *Jackson v. Raemisch*, 726 F. Supp. 2d 991, 999 (W.D. Wis. 2010) ("The question is not whether a restriction places a substantial burden on an average adherent, but whether the plaintiff is substantially burdened in practicing his sincerely held beliefs."). Thus, the prisoner's own testimony on this point usually will be the most important piece of evidence in making this determination. *Koger*, 523 F.3d at 789, 799-800 ("[C]lergy opinion has generally been deemed insufficient to override a prisoner's sincerely held religious belief."). Expert testimony could be useful to bolster or to undermine a prisoner's testimony about the sincerity of his beliefs, but, as noted above, defendants are not challenging plaintiff's sincerity. In any event, a court cannot make credibility determinations on a motion for summary judgment. *Darchak v. City of Chicago Bd. of Education*, 580 F.3d 622, 632-33 (7th Cir. 2009).

It is understandable that prison officials would want to look to an "objective" source to determine what a prisoner "needs" to practice his religion because this helps distinguish sincere requests for religious accommodation from conniving attempts by prisoners to use religion accommodation to achieve nonreligious goals. But this approach would make administrators and courts the "arbiters of orthodoxy," a role that the court of appeals and the Supreme Court have rejected in part because of "[t]he danger that courts will find themselves taking sides in religious schisms." *Mack*, 80 F.3d at 1179. Although a subjective test may make it more difficult for defendants to defeat a claim with respect to this element, that is the necessary result of an element that requires an inquiry into the extent of the burden on the plaintiff's beliefs. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) ("Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest.").

In some parts of his declaration and his proposed findings of fact, plaintiff makes the same mistake as defendants by framing the question as what is "fundamental" to the practice of Odinism. *E.g.*, Plt.'s Aff. ¶¶ 27-28, dkt. 63. Plaintiff does not argue that he qualifies as an expert, so I cannot consider his views on Odinism as a general matter. However, I will assume for the purpose of this opinion that when plaintiff says that a particular religious practice is "fundamental," he is referring to his personal beliefs. In particular, I understand plaintiff to be saying in his affidavit that "Blot is a fundamental part" of *his* religious exercise and that he believes Blots must be performed at least once of month and as part of a group. Id. Other courts have concluded that Odinists' religious exercise may be substantially burdened by being unable to engage in group worship devoted to their own beliefs. *E.g.*, *Gordon v. Caruso*, 2009 WL 6040729, *7 (W.D. Mich. 2009).

Defendants argue that plaintiff's exercise of religion was not substantially burdened by being grouped with other pagans because Odinists share similarities with those groups. However, this observation seems to miss the point. Although both sides to some extent have focused on the way DOC has attempted to group diverse religions, for the purpose of this case, the question is not whether it was permissible to group Odinists and Wiccans, but whether this grouping, in practice, sufficiently accommodated plaintiff's religious beliefs under the free exercise clause.

Unfortunately, neither side discusses in detail the content of the Pagan group meetings. However, it appears to be undisputed that the group did not perform Blot while plaintiff was at the Green Bay prison. Defendants say that the Pagan group volunteer focused on Odinism at several meetings in the year 2010, but plaintiff had been transferred by then. Defendants do not suggest that issues specific to Odinism were included on a regular basis during the relevant

time period or that the volunteer ever led a Blot. Because the ability to conduct Blot is the primary reason that plaintiff has identified for wanting a separate Odinist group, I cannot say as a matter of law that plaintiff has failed to show that defendants substantially burdened his religious exercise. Further, I cannot say as a matter of law that it would have been sufficient for plaintiff to conduct a Blot by himself in his cell.

(2) Neutrality

Defendants do not seek summary judgment on the ground that other sects at the Green Bay prison are limited in their ability to engage in group worship to the same extent as the Odinists, so I need not consider this issue. *Sublett v. John Wiley & Sons, Inc.*, 463 F.3d 731, 736 (7th Cir. 2006) ("As a general matter, if the moving party does not raise an issue in support of its motion for summary judgment, the nonmoving party is not required to present evidence on that point, and the district court should not rely on that ground in its decision."). Although defendants say generally that each "umbrella" group includes multiple sects, they do not suggest that the differences between Odinists and Wiccans are analogous to and no greater than the differences between grouped Protestant denominations. *Rust v. Nebraska Dept. of Correctional Services Religion Study Committee*, 2010 WL 1440134, *2 (D. Neb. 2010) ("Although Defendants may have determined that Baptists and Lutherans are able to worship together, the evidence before the court at this time indicates that Theodish Belief and Asatru practitioners have significant doctrinal conflicts and cannot worship together.").

In any event, because plaintiff is alleging that he is unable to participate in a group service that has any religious significance to him, it would be unlikely that defendants could

obtain summary judgment on this ground unless defendants did not allow *any* group to engage in meaningful group worship. Although the parties do not say whether other sects in the Pagan group are similarly dissatisfied, DOC's own policy discusses opportunities for "Catholic Mass, Sweat Lodge Ceremony and Protestant Worship Services," dkt. 49-1, at 5, which suggests that prisoners outside the Pagan group have better opportunities for group worship.

(3) Relationship to a Legitimate Penological Interest

Under *Turner*, 482 U.S. at 89, four factors are relevant when deciding whether a restriction on a prisoner's constitutional right is reasonably related to a legitimate penological interest: whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; whether alternatives for exercising the right remain to the prisoner; what impact accommodation of the right will have on prison administration; and whether there are other ways that prison officials can achieve the same goals without encroaching on the right.

Defendants identify several reasons why they did not allow plaintiff and other Odinists to engage in group worship, but I only need to consider this one: no qualified nonprisoner volunteers were available to lead the service. Plaintiff does not argue that defendants were required to hire a Odinist chaplain or that they were required to try harder to find an appropriate volunteer. Plaintiff himself does not point to any potential volunteers that defendants should have asked. Further, plaintiff does not argue that defendants should have asked the Pagan group volunteer to lead the Blot or that defendant Donovan himself should have done so. It appears to be undisputed that neither person was qualified to lead the service. Because plaintiff does not raise the issue, I do not consider whether defendant Donovan could

be required under the free exercise clause to educate himself about Odinism so that he could lead the service himself.

Plaintiff's primary argument is that the rule requiring a nonprisoner to lead the service is arbitrary and irrational. However, the court of appeals established long ago that prison officials are justified in requiring an approved nonprisoner to lead prisoners in group worship. *Johnson-Bey v. Lane*, 863 F.2d 1308, 1310-11 (7th Cir. 1988) (prison officials "need not . . . allow inmates to conduct their own religious services, a practice that might not only foment conspiracies but also create (though more likely merely recognize) a leadership hierarchy among the prisoners"); *Hadi v. Horn*, 830 F.2d 779, 784-85 (7th Cir. 1987) (rejecting claim that Muslim prisoners were entitled to lead their own services when chaplain or volunteer was not available). *See also Adkins v. Kaspar*, 393 F.3d 559, 565 (5th Cir. 2004) (upholding prison requirement that volunteer must supervise religious services); *Tisdale v. Dobbs*, 807 F.2d 734, 738-39 (8th Cir. 1986) (same).

Plaintiff does not acknowledge *Johnson-Bey* or any of the other cases addressing this issue, but he argues that other permitted practices throughout Wisconsin prisons show that no volunteer is needed. First, he points out that defendant Donovan allows the Native American group at the Green Bay prison to hold a "pipe and drum service" without an outside volunteer. In addition, he says that Odinists and other prisoners at the Wisconsin Secure Program Facility are allowed to lead group services. Although plaintiff's evidence may suggest that DOC should consider a more comprehensive approach to accommodating Odinist religious practices, none of the evidence plaintiff cites is sufficient to overcome defendants' motion for summary judgment.

With respect to the pipe and drum service, plaintiff includes a conclusory allegation in his affidavit that such services are "led by prisoners." Plt.'s Aff., dkt. 63, ¶ 36. However, he does not explain what that means or provide any evidence showing that prisoners participating in the pipe and drum service exert control over other prisoners or otherwise function as a leader in any meaningful sense. (Plaintiff also cites the affidavit of another prisoner, which is just as vague. Kashney Aff., dkt. 78). Without specific evidence on those issues, this argument fails because it is impossible to tell whether the Native American ceremony raises the same concerns as a prisoner-led Odinist service. *E.g., Everroad v. Scott Truck Systems, Inc.*, 604 F.3d 471, 480 (7th Cir. 2010) (refusing to consider affidavit that described conduct as "humiliating" without giving details); *Drake v. Minnesota Mining & Manufacturing Co.*, 134 F.3d 878, 887 (7th Cir.1998). ("Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter[;] rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted.").

With respect to religious services at WSPF, even if I assume that plaintiff had adduced evidence that Odinist prisoners there are permitted to lead a Blot, this merely demonstrates what this court has been telling plaintiff (and he has been vigorously contesting) since the beginning of this case: wardens at different prisons may come to different conclusions about what is necessary to keep the prison safe and secure. It may be that the warden of WSPF has concluded that it does not create an unacceptable security risk to allow prisoners there to conduct religious services without a nonprisoner to lead them, but this does not mean that it is irrational or discriminatory for wardens at other prisons to be unwilling to take that risk. *Cf. Ellis v. United Parcel Service, Inc.*, 523 F.3d 823, 826-27 (7th Cir. 2008)(court cannot infer discriminatory intent

when different decision makers are involved). Plaintiff cites no authority to support a contrary view.

In his brief, plaintiff includes one line that an alternative would be to "approve a pre-approved script of the blot," Plt.'s Br., dkt. 60, at 7, but he has not shown that using a "preapproved script" would have addressed defendants' concerns or would have accommodated his religious exercise. First, if Odinist prisoners were to use a "preapproved script," who would prepare it and who would "preapprove" it? Plaintiff does not identify any nonprisoner who would have been willing or able to do this. To the extent plaintiff believes that he or another Odinist prisoner could have written and chosen the script, this resurrects the DOC's concern about elevating prisoners to positions of religious leadership. The court of appeals rejected an argument similar to plaintiff's in *Hadi*, 830 F.2d at 786-87, in which the question was whether Muslim prisoners had a right to perform Jumah services without a nonprisoner to lead them:

> The plaintiffs argue that the security rationale may justify forbidding inmates to give the Jumah sermon but this rationale does not explain why inmates may not lead the prayer portion of Jumah. We reject this approach because, although it might avoid doctrinal disputes, it still places an inmate in a position of authority over other inmates in the context of a religious service. As another alternative, the plaintiffs suggest that the defendants should have permitted the services if a chaplain of any denomination were present to supervise them. This suggestion, however, does not fully meet the defendants' security concerns. A Muslim chaplain is in a better position to resolve doctrinal disputes that might arise at a service than is a chaplain of another denomination with only limited exposure to the tenets of Islam.

The same is true in this case. Without a qualified outside volunteer, a prisoner will have to determine the content of the service. Plaintiff simply ignores this problem. *Compare Hummel v. Donahue*, 2008 WL 2518268, *5-6 (S.D. Ind. 2008) (in case decided under RLUIPA,

concluding that "preapproved script" was possible alternative to prisoner-led services when there was evidence that other religious groups were allowed to do this and plaintiffs identified nonprisoner volunteer who was willing to prepare script).

Further, plaintiff's own evidence suggests that the Blot ceremony is much more involved than simply reading a prayer. Plt.'s Aff., dkt. 63-6; dkt. 65. Who is to determine whether and how these other rituals are to be performed? Plaintiff doesn't say.

One issue that gives me pause is that plaintiff had no alternatives for engaging in Odinist group worship. *Beard v. Banks*, 548 U.S. 521, 532 (2006) ("The absence of any alternative thus provides some evidence that the regulations are unreasonable, but is not conclusive of the reasonableness of the Policy.") (internal quotations and brackets omitted). Prisoner-led services undermine security but no qualified nonprisoners were available. One Seventh Circuit opinion suggests that prison officials may have a heightened burden to justify a decision to deny prisoners the ability to lead worship services when no other alternatives may be found. In *Johnson-Bey*,863 F.2d at 1311-12, the court stated that "the reasonableness of the ban on inmates' conducting their own religious services is related to the availability of substitutes, whether chaplains employed by the prison or ministers invited on a visiting basis." Other language in the same case suggests that prison officials may have an obligation to find *someone* to lead the service if they do the same for other religious groups. *Id.* at 1312-13 ("The potential financial burden on small sects of providing visiting ministers to prison-the prison authorities deem them 'volunteers' and will not compensate them even to the extent of reimbursing them for their expenses, while picking up the full tab for full-time chaplains for Catholic and Protestant prisoners-is troubling.").

As noted above, plaintiff does not develop an argument that defendants should have done more to find a qualified nonprisoner leader. Further, because plaintiff has never suggested that he even *wanted* Donovan to lead Blot or Sumbel, the relevance of the language in *Johnson-Bey* to our facts is questionable.[1]

(4) Qualified immunity

Even if *Johnson-Bey* provides some support to plaintiff's claim, it would not be enough to overcome defendants' qualified immunity defense, which requires plaintiff to show that "clearly established" law required defendants to permit plaintiff to hold group worship services for Odinists without a nonprisoner leader. *Hernandez v. Cook County Sheriff's Office*, 634 F.3d 906, 914 (7th Cir. 2011)("Generally, qualified immunity protects government agents from liability when their actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known.")

The primary question in *Johnson-Bey* was whether prison officials were applying the "no prisoner leaders" rule arbitrarily. Although plaintiff raises this issue, it is not persuasive in this case because of the different prisons and decision makers involved. The court did not identify any other circumstances under which it would be unreasonable to apply the rule despite the absence of alternatives for group worship. Therefore, even if I were to conclude that defendants had an obligation to accommodate plaintiff's wish to engage in group worship, this would be an extension of the existing law that would expand the holding of *Johnson-Bey* to cover the facts

[1] Although plaintiff cites many cases in his brief, he does not cite *Johnson-Bey*, which might indicate that he does not believe that it is relevant to his claim.

presented in this case. In other words, there is no clearly established law on the issue raised by plaintiff's complaint that defendants could have violated. Perforce, defendants have qualified immunity and they are entitled to summary judgment on plaintiff's claim related to group worship. *See Hernandez*, 634 F.3d at 915 ("The relevant, dispositive inquiry is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.")

C. Group Study

In addition to group worship, plaintiff asked defendants for the opportunity to engage in "group study." However, plaintiff does not explain what religious significance group study would have for him. In fact, he does not develop any evidence or argument regarding the reason he wanted to engage in group study or the extent to which such a request could be accommodated without threatening defendants' legitimate penological interests. Accordingly, to the extent plaintiff intended to include a claim for Odinist group study, he has forfeited that claim.

D. Religious Items at the Green Bay Prison

The following religious items that plaintiff requested are at issue in this case: (1) an altar; (2) an altar cloth; (3) "a blessing bowl," (4) a ritual drinking horn; (5) candles; (6) a rune staff; (7) a Thor's Hammer; (8) mead; (9) images of Gods for use in sacred rituals; (10) an oath ring; (11) an evergreen twig; (12) a sun wheel; (13) a set of runes, rune cards and "runic studies"; and (14) a hlath.

Most of these items do not require extended discussion because plaintiff requested them as part of group worship only. Because I have concluded that defendants did not violate plaintiff's clearly established rights under the free exercise clause by failing to accommodate his requests to engage in group worship, it follows that the defendants did not violate plaintiff's clearly established rights by failing to grant him permission to possess items which had no identified religious purpose outside of group worship. *Mayfield*, 529 F.3d at 608 ("The absence of the Blotar items in the chapel does not impose a distinct burden on Mayfield's religious practice unless the Odinists can meet without a volunteer.").

This leaves plaintiff's request for runes, study books and a hlath. With respect to the hlath, the problem is that plaintiff has adduced no admissible evidence regarding the religious significance that the head garment has for him. Plaintiff says nothing about a hlath in his proposed findings of fact. In his affidavit, he says only that a hlath is one the items he "must have . . . to practice Odinism." Plt.'s Aff. ¶ 30, dkt. 63. However, he fails to explain why he needs it or how he would use it to practice his religion. His conclusory assertion is not sufficient to defeat defendants' motion for summary judgment. *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 354 (7th Cir. 2002) ("It is well-settled that conclusory allegations . . . do not create a triable issue of fact."); *Borzych*, 439 F.3d at 390. Even if I assume that plaintiff subscribes to beliefs espoused in the affidavits submitted by Murray and Owen, this does not help him because neither witness discusses the importance of a hlath.

Even if the free exercise clause does not require a plaintiff to show that his religious exercise was substantially burdened, he must show at the very least that the activity being restricted is "religious." *Thomas*, 450 U.S. at 713 ("Only beliefs rooted in religion are protected

by the Free Exercise Clause."). Without some specific explanation regarding the religious significance to plaintiff of a hlath, I cannot conclude that the restriction implicates plaintiff's free exercise rights.[2]

With respect to the study books, it is undisputed that DOC policy allowed plaintiff to have these items. All plaintiff had to do was order them.

This leaves plaintiff's request for runes. Even if I assume that plaintiff wanted runes to practice his religion, this claim has other problems that plaintiff cannot overcome. Defendants justify the prohibition of runes primarily on the ground that prisoners could use them to communicate in code because symbols are engraved on them. In addition, defendants state that they believe that rune symbols have been used by Neo-Nazi groups and white supremacists. *Griffin v. Commonwealth of Virginia*, 2008 WL 2944553, *4 (W.D. Va. 2008) (discussing relationship between rune symbols and Neo-Nazis). This court accepted these arguments in *Borzych v. Frank*, 2010 WL 1026977, *4 (W.D. Wis. 2010), concluding that a ban on rune stones and rune cards was reasonably related to these legitimate penological interests. *See also Mayfield*, 529 F.3d at 611 (upholding ban on runes).

Plaintiff raises several potential problems with the defendants' arguments that do not appear to have been raised in *Borzych*. First, he says that prisoners at the Green Bay prison are allowed to write their own rune symbols on paper, which plaintiff opines would be an easier method to communicate in code than a set of pre-carved stones. Second, prisoners are allowed to possess tarot cards, which also include symbols. These are valid points, but they do not

[2] At least one other state prisoner has provided this court with his personal belief as to the religious significance to him of a hlath, *See Liebzeit v. Thurmer*, 10-cv-170-slc, Pltf's Decl., dkt. 119 at ¶¶ 77 and 103, but pursuant to the discussion above, this court does not know and cannot assume that plaintiff in the instant case shares these beliefs.

necessarily show that defendants' actions are unreasonable. Simply because prison officials do not prohibit prisoners from writing in their own journals does not mean that officials must take the additional step of encouraging the use of runes in a more tangible form. *Krispin v. Thurmer*, 2010 WL 2262613, *4 (W.D. Wis. 2010) ("[B]ecause prison restrictions are not subject to strict scrutiny, they are not invalid simply because they prohibit less conduct than might be justified by the prison officials' legitimate interest.").

The use of tarot cards may be a more serious inconsistency because it suggests that defendants may be treating Odinist prisoners less favorably than adherents of other faiths. However, the comparison between runes and tarot cards is not a perfect one and plaintiff has not developed an argument that tarot cards "present the distinct problems posed by personal possession of runestones." *Mayfield*, 529 F.3d at 611.

Even if I were to agree with plaintiff that defendants were not applying their policies in a neutral manner, in light of *Borzych* and *Mayfield*, I could not conclude that plaintiff has shown that defendants were violating clearly established law, particularly because plaintiff does not cite any cases in which a court found that a ban on the possession of runes was unconstitutional. Accordingly, defendants are entitled to assert qualified immunity on plaintiff's runes claim and to obtain summary judgment on this basis.

III. Equal Protection Claims at the Green Bay Prison

Plaintiff raises an alternative legal theory under the equal protection clause with respect to the religious practices and items he was denied while at the Green Bay prison. As this court has noted in previous orders, generally a claim under the equal protection clause adds little to

a claim under one of the religious clauses because the fundamental question is the same: "was the defendant treating members of some religious faiths more favorably without a secular reason for doing so?" *Goodvine v. Swiekatowski*, No. 08-cv-702-bbc, 2010 WL 55848, *3 (W.D. Wis. Jan. 5, 2010). *See also World Outreach Conference Center v. City of Chicago*, 591 F.3d 531, 534 (7th Cir.2009) ("Discrimination by an official body can always be attacked as a violation of the equal protection clause-but that would usually add nothing, when the discrimination was alleged to be based on religion, to a claim under the religion clauses of the First Amendment.").

With respect to the vast majority of plaintiff's claims arising out of the Green Bay prison, I already have concluded that defendants had a secular reason for any differential treatment that plaintiff received. The one exception is the denial of plaintiff's request for a hlath, which I am dismissing not because plaintiff failed to show discriminatory treatment but because he has failed to show that a hlath has any religious significance for him. This holding leaves room for a claim under the equal protection clause, at least if plaintiff can show that defendants are discriminating against him without a rational basis. *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, (7th Cir. 2007) (applying rational basis review to discrimination claim after free exercise claim failed).

It is undisputed that head garments are not completely banned from the Green Bay prison. Jewish prisoners may wear yarmulkes and Muslims may wear kufis. In fact, defendant Donovan recommended that plaintiff's request for a hlath be approved but defendants Mosher and Pollard rejected this recommendation for reasons that are not immediately apparent. Because defendants do not identify any rational basis for the difference in treatment and I cannot conceive of one, I am denying defendants' motion for summary judgment with respect

to this claim. However, I am dismissing this claim as to defendant Donovan: Because he wished to approve this request, he cannot be held liable for the contrary decision of higher ranking officials.

IV. Thor's Hammer Emblem in Segregation at WSPF

Plaintiff's final claim is that defendants Wisconsin Department of Corrections, Rick Raemisch and Peter Huibregtse are violating his rights under the Religious Land Use and Institutionalized Persons Act, the free exercise clause and the equal protection clause by refusing to allow him to keep a Thor's Hammer emblem while in segregation. Under RLUIPA, once the plaintiff shows that the defendants substantially burdened his sincerely held religious beliefs, the burden shifts to the defendants to show that their actions further "a compelling governmental interest," and do so by "the least restrictive means." *Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005).

With respect to the substantial burden on plaintiff's sincere religious beliefs, he says that he believes that wearing a Thor's Hammer around his neck protects him from "ill will" and that he uses it to "hallow [his] own. . . space" and "consecrate food and drink." Plt.'s Aff. ¶¶ 52-56. Although this not a very detailed explanation, I conclude that, for summary judgment purposes, it is minimally sufficient in the absence of contrary evidence from defendants.

Defendant justifies the ban on the grounds that prisoners in segregation are a higher security risk than other prisoners and items such as a Thor's Hammer could be used as a weapon, particularly if it is made out of metal. The problem with this justification is the same as that for banning hlaths: the evidence suggests that defendants do not apply their policy consistently.

Defendants ban items they classify as "emblems" such as a Thor's Hammer and a crucifix, but they allow prisoners in segregation to keep a rosary with them, so long as the rosary is made of wood or plastic. This is so even though crosses are attached to rosaries and "even though the addition of a string of beads makes the ensemble more dangerous (it can be used to strangle), and no less suitable as a gang symbol, than the cross sole." *Sasnett v. Litscher*, 197 F.3d 290, 293 (7th Cir. 1999).

This case appears almost indistinguishable from *Sasnett*. Defendants identify no reason why a cross made out of wood or plastic is permitted when it is attached to a rosary, but a Thor's Hammer of the same size and material is banned. *Compare Polk v. Patterson*, 2011 WL 1897798, *7 (D. Utah 2011) (discussing policy that allows prisoners to keep Thor's Hammers made out of plastic). In light of the similarity between this case and *Sasnett*, which was decided over a decade ago, I conclude that defendants are not entitled to qualified immunity on this claim.

Plaintiff did not file his own motion for summary judgment, so I decline to enter judgment in his favor at this time. *John M. v. Board of Educ. of Evanston Tp. High School Dist. 202*, 502 F.3d 708, 713 (7th Cir. 2007) ("[S]ua sponte judgments are proper only when the litigants have proper notice that the district court is contemplating entering such a judgment and have a fair opportunity to submit evidence prior to the entry of such a judgment."). However, there is no point in going to trial on claims that will ultimately be decided as a matter of law by the court.

In another case raising similar issues, *Liebzeit v. Thurmer*, 10-cv-170-slc, I am allowing *both* sides to file new motions for summary judgment on the remaining issues in the case. For the sake of consistency, I will take the same course in this lawsuit. Accordingly, I will give the

parties an opportunity to show that they are entitled to judgment as a matter of law on plaintiff''s claims that (1) defendants violated his rights under the equal protection clause by refusing his request for a hlath and; (2) defendants violated his rights under RLUIPA, the free exercise clause and the equal protection clause by refusing to allow him to keep a Thor's Hammer emblem while housed in segregation. With respect to plaintiff's claim for a Thor's Hammer, the parties should address the question whether plaintiff is entitled to an injunction and, if so, what the scope of the injunction should be.

In addition, because it appears that defendants overlooked plaintiff's claims under the establishment clause, I am giving both sides an opportunity to address these claims as well. Finally, I am striking the trial date give the parties some breathing room to address these remaining issues.

V. Damages

Defendants ask for a ruling on summary judgment limiting plaintiff to nominal damages. Under 42 U.S.C. § 1997e(a), plaintiff is not entitled to damages for emotional distress because he did not suffer a physical injury and he does not identify any economic losses that he suffered. This leaves the possibility of punitive damages.

"Punitive damages are recoverable in § 1983 actions where the defendant had a reckless or callous disregard to the federally protected rights of others." *Woodward v. Correctional Medical Services of Illinois, Inc.*, 368 F.3d 917, 930 (7th Cir. 2004). In this case, defendants have offered no specific justification for their decision to deny plaintiff's requests for a hlath and they have failed to explain why they forbid prisoners in segregation from possessing a Thor's Hammer

made of wood or plastic. As a result, I cannot conclude that a reasonable jury could not find on this record that defendants acted with reckless disregard of plaintiff's rights. Accordingly, I decline to conclude as a matter of law that plaintiff may not seek punitive damages.

ORDER

It is ORDERED that

(1) The motion for summary judgment filed by defendants Wisconsin Department of Corrections, Rick Raemisch, William Pollard, Dennis Mosher, Peter Huibregtse and Michael Donovan, dkt. 46, is DENIED with respect to plaintiff Derek Kramer's claims that:

> (a) Defendants Pollard and Mosher denied plaintiff's request to wear a hlath, in violation of the equal protection clause; and
>
> (b) Defendants Wisconsin Department of Corrections and Huibregtse are refusing to allow plaintiff to keep a Thor's Hammer emblem in segregation, in violation of RLUIPA, the free exercise clause and the equal protection clause.

(2) Defendants' summary judgment motion is GRANTED in all other respects. Plaintiff's complaint is DISMISSED as to defendants Raemisch and Donovan.

(3) Defendants' motion to "strike" the affidavits of Laurel Owen-Scutair and Vlagard Murray, dkt. 79, is DENIED as unnecessary.

(4) *Both* sides may have until August 31, 2011 to file new motions for summary judgment on the following questions:

> (a) Whether summary judgment should be granted to plaintiff on the claims identified in Paragraph (1) of this order;
>
> (b) Whether summary judgment should be granted on his claims under the establishment clause; and
>
> (c) Whether the court should enjoin defendants if plaintiff succeeds as a matter of law on his claim regarding a Thor's Hammer and, if so, what the scope of the injunction should be.

The parties may have until September 28, 2011 to file a response and until October 12, 2011 to file a reply.

(5) The trial date and all other pretrial deadlines are STRICKEN. The court will set new deadlines after resolving the remaining questions, if a trial is still necessary.

Entered this 26th day of July, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge