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

DAVID LaFRANCHI,

Plaintiff,

v.

MICHAEL DITTMANN, GARY HAMBLIN, CHAPLAIN MEJCHAR, and SALLY WESS,

Defendants.

OPINION AND ORDER

11-cv-143-slc

Plaintiff David LaFranchi, formerly an inmate at the Redgranite Correctional Institution in Redgranite, Wisconsin, brings this civil action for monetary and injunctive relief pursuant to 42 U.S.C. § 1983, claiming a violation of his rights under the First Amendment while he was incarcerated at the Redgranite Correctional Institution.[1] LaFranchi alleges that defendants Michael Dittmann, Gary Hamblin, Chaplain Mejchar, and Sally Wess violated the Free Exercise Clause by interfering with his practice of his Hebrew Israelite Messianic Natsarim faith.

LaFranchi's lawsuit was triggered by a January 2011 decision by RGCI's prison chaplain and other RGCI officials that plaintiff's religious study group was best classified under the Department of Correction's Protestant umbrella group rather than its Jewish umbrella group. Although these officials reversed their decision in September 2011, the decision was in place long enough to prevent LaFranchi from celebrating the 2011 feast of Passover. (LaFranchi complains of other deprivations as well, but they have no support in the record.)

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[1] As this court noted in its order on the motion for preliminary injunction, LaFranchi's allegations, though framed as a claim under § 1983, also stated a claim under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1(a). Defendants contend that any RLUIPA claim now is moot because LaFranchi has been released from prison. *See* Defs.' Brief, dkt. 48, at 4-5. LaFranchi has not opposed defendants' contention; indeed, he denies that he is bringing any claim under RLUIPA. Accordingly, in light of LaFranchi's waiver and the apparent mootness of any RLUIPA claim, I am analyzing LaFranchi's claim only under the First Amendment.

Defendants have moved for summary judgment on the grounds that LaFranchi has failed to show that his religious exercise was substantially burdened by the short-lived change in umbrella groups, that any limitations on his religious exercise were reasonably related to legitimate penological interests and that defendants are entitled to qualified immunity. Alternatively, they argue that LaFranchi is limited to nominal damages. Because LaFranchi no longer is imprisoned at RGCI, there is no basis to award him injunctive relief.

I agree with defendants, so I am granting their motion and closing this case.

Two preliminary matters require resolution: First, defendants object to LaFranchi's submissions on the ground that he did not comply with this court's *Procedures to be Followed on Summary Judgment* and one of his documents (a purported copy of a series of emails exchanged between one of the Hebrew Roots study group leaders, Bruce Olson, and the prison chaplain, defendant Mejchar) is not properly authenticated. Defs.' Reply, dkt. 62. Defendants' objections are well-taken, but the outcome does not change even if the court considers LaFranchi's materials. Accordingly, I have overlooked LaFranchi's procedural errors and considered his submissions.

Second, while this motion was pending, LaFranchi filed a motion for appointment of counsel. Dkt. 59. I am denying this motion. Although LaFranchi has satisfied the requirement of showing that he has attempted to make reasonable efforts to find a lawyer on his own, I am not convinced that the legal and factual difficulty of this case exceeds plaintiff's demonstrated ability to prosecute it. *Pruitt v. Mote*, 503 f.3d 647, 654, 656 (7th Cir. 2007). LaFranchi's submissions demonstrate that he is able adequately to present his position and to marshal evidence to support his claim. To the extent that LaFranchi did not comply with this court's procedural rules concerning summary judgment and failed to authenticate certain submissions,

I have overlooked those errors and have considered his evidence. Even taking this evidence into account, I conclude that this case does not involve any complex factual disputes. Indeed, the facts are not really disputed. The critical questions in this case is whether LaFranchi's exercise of religion was substantially burdened and, if so, whether the chaplain has articulated legitimate penological reasons for her decision. Answering these questions requires a legal analysis that this court is equipped to perform even-handedly without input from a lawyer representing LaFranchi. In doing so, I have given the benefit of doubt to LaFranchi on every factual dispute and I have applied the law without regard to LaFranchi's *pro se* status. For all these reasons, I conclude that this is not one of those relatively few cases in which appointment of counsel is warranted. Put another way, the outcome would not have been different if a lawyer had prepared LaFranchi's response to the defendants' summary judgment motion.

For the purpose of deciding defendants' motion for summary judgment, I find from the parties' submissions that the facts set out below are material and undisputed. Many of these facts are taken verbatim from the court's order on LaFranchi's motion for a preliminary injunction, dkt. 35.

FACTS

Plaintiff David LaFranchi was incarcerated at the Redgranite Correctional Institution (RGCI) from January 11, 2010 until March 27, 2012, when he was released from prison. Defendant Gary Hamblin is the Secretary of the Wisconsin Department of Corrections (DOC).

Defendant Michael Dittman is the Warden of RGCI. Defendant Sally Wess is the Food Service Administrator at RGCI.[2]

Defendant Deborah Mejchar was the chaplain at RGCI until February 2011, when she transferred to Fox Lake Correctional Institution. After her transfer, Chaplain Mejchar still came to RGCI once a week until June 2011 to assist inmates meet their religious needs.

A. Prison Policies Related to Religious Umbrella Groups

Inmates incarcerated within DOC institutions adhere to and practice a wide array of religious briefs. Because of limited space and resources, it is impossible for DOC to accommodate each individual inmate's specific religious beliefs and practices. As a means of accommodating the religious needs of the greatest number of inmates within these constraints, DOC uses an "umbrella group" policy. This policy assigns each smaller religious group to one of the DOC's "umbrella religion groups" defined as "inclusive group[s] designed to appeal to a wide range of religious beliefs within a given faith group." DOC's Division of Adult Institutions, DAI Policy #309.61.01. DOC's seven umbrella groups are Catholic, Eastern Religions, Islam, Jewish, Native American, Pagan and Protestant. Each umbrella group allows its members to engage in the core religious practices identified with that group; not surprisingly, these core practices vary from group to group. Using umbrella groups allows prison officials better to accommodate inmates' religious needs by efficiently coordinating religious services and study groups among similar-minded inmates so as to maximize the resources available. Without the use of umbrella groups, inmates would likely have less opportunities to practice their religions

[2] Plaintiff initially sued a supervising officer, Randall Trinrud, but has dismissed him voluntarily.

because resources such as staff time, institution funds and space would have to be divided among an ever-increasing number of different religions.

The use of umbrella groups also serves a security function: by gathering smaller sects under the most appropriate umbrella, a correctional institution can better assure that each group actually is meeting for legitimate religious reasons rather than as a cloak for some impermissible non-religious purpose.

DOC provides opportunities for inmates to practice their religion through religious services and study groups, which are led by outside spiritual leaders or volunteers approved by the institution. If required by a religion, institutions may provide special or symbolic foods as supplements to the inmates' standard diet and may provide a full religious feast once a year. In general, an inmate's access to religious services, study groups, property, diet and feasts is dictated by the umbrella religion group that the inmate designates on his religious preference form, known as the DOC-1090. *See*, *e.g.*, Def. Exh. 103, dkt. 30-4 (a copy of LaFranchi's Jan. 20, 2010 form). However, all religious practices within the institution must be consistent with security practices and principles, rehabilitative goals of inmates, health and safety concerns and the allocation of limited resources.

If an inmate does not self-identify his religion as falling under one of DOC's seven umbrella groups, the form DOC-1090 provides a box for "Other" that the inmate may check and then state his religion. In this situation, it is the chaplain's responsibility, under the supervision of the Corrections Programs Supervisor, to determine to which umbrella group DOC should assign this religion. The prisoner then has the same right to programming and diet as other prisoners within the umbrella group, if he wishes to partake. Even so, a prisoner who selects

"Other" is permitted to practice his religion through individual study, personal meditation, religious books and literature, approved religious property, pastoral visits, other approved individual religious observances in his living quarters and correspondence with fellow believers.

Some inmates adhere to religions whose practices do not fall under one umbrella group's allowed practices but span the allowed practices of two or more umbrella groups. Even so, the inmate may select only one umbrella group, picking the one that suits the greatest number of his needs, while retaining the option to meet his additional religious needs (*i.e.*, those not included under the umbrella group he has chosen) through individual religious practice to the extent practicable. As noted below, this sometimes requires an inmate to make tough choices.

Inmates may change their reported religious preference but must wait to do so for six months from the date they last filled out the DOC-1090.

II. Plaintiff's Religious Practices

LaFranchi is an adherent of the Hebrew Israelite Messianic Natsarim faith, which sometimes is referred to as "Hebrew Roots." Hebrew Roots adherents follow practices and beliefs derived from both Christianity and Judaism. Although they do not consider themselves to be Christian, they believe the Bible from "cover to cover" and believe in the Messiah, whom they refer to as Yahshua. They do not celebrate Christmas or Easter, believing them to be manmade holidays. However, like many Jews, Hebrew Roots adherents observe feasts described in the Old Testament, including Passover. (Adhering to a kosher diet also is a component of the Hebrew Roots faith, although LaFranchi was not following a kosher diet at the time of the decision that led to this lawsuit.)

In January 2010, LaFranchi filled out a DOC 1090 form and chose "Jewish" as his religious preference, while also handwriting the phrase "Natzrite of Yisra'□l" next to his designation. Prisoners who designate "Jewish" as their umbrella group may attend Jewish religious services and study groups, possess religious property approved for the Jewish umbrella group, and choose to participate in either a kosher or vegan diet plan. A kosher diet is provided only to inmates who choose Jewish as their religious preference and whose request for a kosher diet has been approved by the chaplain. Inmates in the Jewish umbrella group may elect to participate annually in Passover, which includes a celebratory feast, which includes Matzo (Matzah) crackers and macaroons. Matzo crackers are not served at any other time to Jewish inmates as part of the kosher diet. Jewish inmates do not have access to "natural salt" or "salt covenants."

Under the Jewish umbrella group, LaFranchi participated in the 2010 Jewish Passover, which began at sunset on Monday, March 29, 2010 and ended at sunset on Tuesday, April 6, 2010. On May 24, 2010, he signed and submitted a "Religious Diet Request" form DOC-2167. On May 27, 2010, Chaplain Mejchar approved his request; plaintiff was placed on a kosher diet shortly thereafter. LaFranchi stopped receiving kosher meals on October 2, 2010. (The reason he stopped is not in the record. LaFranchi does not suggest that it is related to his claims in this lawsuit.)

At some point in 2010, a group of about ten inmates involved with Hebrew Roots, including LaFranchi, reported to Chaplain Mejchar that they had stopped attending the Jewish service conducted by Rabbi Stallman (an outside volunteer) because they did not feel he was meeting their religious needs. One of these inmates suggested that an individual named Bruce

Olson, along with his wife, Victoria Olson, form a new study group at RGCI. Mejchar contacted the Olsons, who agreed to teach a "Hebrew Roots" religious study group.

Under DAI Policy 309.61.01, "[a]pproved religious study groups are designed to appeal to a wide range of religious beliefs within a given umbrella religion group." It was difficult for Chaplain Mejchar to determine into which umbrella group she should place the Hebrew Roots group because the group derived its beliefs and practices from both Christianity and Judaism. (Put another way, Hebrew Roots shared beliefs and practices with both umbrella groups but was not a good fit under either). Chaplain Mejchar initially approved the Hebrew Roots religious study group for inmates who, like LaFranchi, had chosen the Jewish umbrella group as their religious preference. The new study group began meeting in August 2010. LaFranchi attended the meetings.

Chaplain Mejchar attended and observed one or more of the group's meetings. In doing so, she became aware that the Olsons' teachings were based on the entire Bible, including the New Testament. In addition, she received correspondence from Victoria Olson indicating that the volunteers were "preaching the Messiah with an understanding of the Old Testament." In Mejchar's opinion, this approach was not consistent with the core religious beliefs of Judaism but were more consistent with Christianity.[3]

Mejchar shared this information with her supervisor, Susan Hamersma, and DOC Central Office Religious Practices Coordinator, Kelli West. Based on what Mejchar had heard and been told about the group's studies, along with the fact that a group of Hebrew Roots inmates had told Mejchar that the Jewish umbrella group had not been meeting their religious needs,

[3] Although Mejchar has not explained the basis for this conclusion, LaFranchi has not submitted any evidence disputing it.

Mejchar, West and Hamersma jointly determined that they should transfer the Hebrew Roots study group from the Jewish umbrella group to the Protestant umbrella group. These administrators concluded that placing the Hebrew Roots groups under the Protestant umbrella would allow the group to participate in and share Protestant congregate activities, feasts and property items that were consistent with Hebrew Roots beliefs and practices. This transfer also would provide an opportunity for other Protestant inmates to participate in the Hebrew Roots group.

According to the Olsons, Mejchar told them that moving the study group under the Protestant umbrella would allow for the group to meet more often. The Olsons also say they emailed the chaplain and expressed concern that moving the group would result in the loss of a kosher diet for some of the Hebrew Roots inmates, and asked if there was someone they could talk to about having Hebrew Roots considered a separate entity from Judaism or Christianity. There is no evidence that the chaplain responded to this request.

On or about January 11, 2011, Mejchar met with LaFranchi and other inmates who participated in the Hebrew Roots religious study group. She advised the inmates that she and other DOC officials had decided that the Hebrew Roots study group had been mistakenly classified as falling under the Jewish umbrella group, when it should have been classified as a study group associated with the Protestant umbrella group. Chaplain Mejchar advised the inmates, including LaFranchi, that they had a choice to make: they could either remain in the Jewish umbrella group, in which case they would no longer be able to participate in the Hebrew

Roots religious study group, or they could change their religious preference to the Protestant umbrella group and continue their studies.[4]

In response to RGCI's newly-announced approach to his religion, on January 11, 2011, LaFranchi submitted a new DOC-1090 on which he checked the "other" box and designated his religious preference to be "Hebrew Roots." Because Hebrew Roots adherents now were in the Protestant umbrella group, LaFranchi no longer was part of the Jewish umbrella group, which meant that LaFranchi could not participate in the Jewish Passover feast and could not receive a kosher diet. (Keep in mind that LaFranchi had stopped receiving kosher meals on October 2, 2010). LaFranchi also was not allowed to attend Jewish religious services conducted by the visiting rabbi. However, he was still allowed to meet with the Hebrew Roots study group. In addition, LaFranchi could attend any Protestant study group or service, if he chose to do so.

On February 9, 2011, letters from Bruce and Victoria Olson were found in LaFranchi's cell. Sometime thereafter, RGCI revoked the Olsons volunteer privileges because they had violated the non-fraternization policy, which prohibited personal contact between DOC volunteers and any inmate.[5] Because the Olsons were the only leaders of the Hebrew Roots study group and because inmates are prohibited from meeting for religious studies without a

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[4] LaFranchi recounts this conversation differently. According to LaFranchi, Chaplain Mejchar told him and the other inmates that superior officials at RGCI and DOC had decided that they were not going to recognize the Hebrew Israelite Messianic Natsarim faith as a legitimate religion anymore and that the inmates would have to change their designation on their DOC-1090 forms in order to "fall under DOC's umbrella." Even if LaFranchi's version is accurate, this would not create a genuine dispute of a material fact. It is not material to the First Amendment analysis what RGCI or DOC officials *said* about LaFranchi's religion; what matters is what they then allowed or forbade LaFranchi to do with respect to his religious practices. There is no genuine dispute as to what *happened* after this meeting.

[5] LaFranchi presents no evidence suggesting that the cell search or subsequent termination of the Olsons was motivated by a desire to interfere with his religious practice, nor does he challenge the neutrality of the non-fraternization policy.

volunteer leader, revoking the Olsons' volunteer privileges constructively disbanded the Hebrew Roots study group.[6]

On September 8, 2011, DOC announced its decision to return RGCI's Hebrew Roots group to the Jewish umbrella religious group. Although DOC recognized that the Hebrew Roots groups shared some religious beliefs and practices with both the Jewish and Protestant umbrella religious groups, DOC decided that the Jewish umbrella group better accommodated these beliefs and practices.

During the eight-month diaspora from January to September, LaFranchi missed RGCI's 2011 Passover feast in April. Because of the policy reversal, LaFranchi was immediately eligible to submit a new DOC-1090 designating the Jewish umbrella group. This would allow him not only to participate in the Hebrew Roots study group (if a new volunteer leader ever was found), but also would allow him to receive a kosher diet and to participate in the Passover feast and all other practices and property permitted under the Jewish umbrella group. But no one at RGCI or DOC told LaFranchi about the policy change; he first learned of it when he received this court's October 6, 2011 order denying his request for a preliminary injunction. Even then, LaFranchi let four more months pass: he did not submit a revised DOC-1090 until February 2, 2012, on which he changed his designation to "Jewish."

LaFranchi avers that as a result of the loss of his kosher diet and "natural salt," being "wrongly labeled as Christian" and "not being able to fellowship with other Hebrew Israelite's of my faith to study Torah and our Father's Commands," he suffered from nervousness, sleep difficulties, anxiety and constipation.

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[6] Chaplain Mejchar's successor, Chaplain William Barwis, Jr. (who is not a defendant in this lawsuit) has been attempting to find a new volunteer to lead the Hebrew Roots group. So far, no luck.

LaFranchi also avers that as of March 12, 2012, he still was not allowed to celebrate feasts, go to the chapel to view and study religious materials or to speak or study Torah with a rabbi. However, LaFranchi does not suggest that any of the defendants in this lawsuit prohibited him from doing these things. Chaplain Barwis has submitted an affidavit explaining that because of time constraints, neither individual inmates nor religious groups may listen to CDs or view DVDs in the chapel except during scheduled services or study times. Because the Hebrew Roots group has no volunteer to lead their study group, there are no scheduled times for these activities. Chaplain Barwis also avers that at no time did LaFranchi contact him to discuss receiving a visit from a pastor or other spiritual leader. *See* Aff. of William Barwis, Jr., dkt. 61.

OPINION

I. Legal Framework

The Free Exercise Clause of the First Amendment applies to the states by virtue of the Fourteenth Amendment. *See Employment Division v. Smith*, 494 U.S. 872, 876–77 (1990). The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. Amend. I. Even in prison, inmates retain this right to practice their religion; however, because of the nature of the prison environment, states may restrict their prisoners' free exercise of religion if the restrictions are compatible with the legitimate penological demands of the state. *Turner v. Safley*, 482 U.S. 78, 89 (1987); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987); *Al-Alamin v. Gramley*, 826 F.2d 680, 686 (7th Cir. 1991). Prison security and economic concerns both are legitimate penological demands. *Al-Alamin*, 826 F.2d at 686.

"When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89; *see also Grayson v. Shuler*, 666 F.3d 450, 453 (7th Cir. 2012) (holding that *Turner* still applies to free exercise claims of prisoners after *Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990)). *Turner* identifies four factors relevant to determining whether a prison regulation or its application is reasonably related to legitimate penological interests:

> (1) Whether there is a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it";
>
> (2) Whether there are "alternative means of exercising the right that remain open to prison inmates";
>
> (3) Whether "accommodation of the asserted constitutional right" will "impact . . . guards and other inmates, and on the allocation of prison resources generally"; and
>
> (4) Whether there is an "absence of ready alternatives" versus the "existence of obvious, easy alternatives."

Turner, 482 U.S. at 89-90 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

When applying these factors to evaluate a challenged regulation, courts must give "appropriate deference to prison officials," *O'Lone*, 482 U.S. at 349, because "the judiciary is 'ill-equipped' to deal with the difficult and delicate problems of prison management." *Thornburgh v. Abbot*, 490 U.S. 401, 407-08 (1989) (citation omitted). In deciding whether a particular prison regulation is constitutional, courts are not required to weigh evenly, or even consider explicitly, each of the four *Turner* factors. *Mays v. Springborn*, 575 F.3d 643, 648 (7th Cir. 2009); *Casey v. Lewis*, 4 F.3d 1516, 1522 (9th Cir. 1993); *Scott v. Mississippi Department of Corrections*, 961 F.2d 77, 80 (5th Cir. 1992).

A. Personal Involvement

Before addressing the merits of LaFranchi's First Amendment claim, I address briefly the question whether Hamblin, Dittman or Wess had any personal involvement in the decision to move the Hebrew Roots religion from the Jewish to the Protestant umbrella group. It is a "well-established principle of law that a defendant must have been 'personally responsible' for the deprivation of the right at the root of a § 1983 claim for that claim to succeed." *Backes v. Village of Peoria Heights, Ill.*, 662 F.3d 866, 869 (7th Cir. 2011).

LaFranchi concedes that there is no evidence to show that Wess was involved in the decision that the Hebrew Roots group should be re-classified as a Protestant-based study group rather that a Jewish-based study group. LaFranchi argues that Hamblin and Dittmann are liable under the doctrine of respondeat superior. He is incorrect: there is no concept of supervisory strict liability under § 1983. *Harris v. Greer*, 750 F.2d 617, 618 (7th Cir. 1984). A supervisor is personally responsible for unconstitutional conduct by underlings only if the supervisor knew about the conduct and facilitated it, approved it, condoned it or turned a blind eye to it. *Matthews v. City of East St. Louis*, 675 F.3d 703, 708 (7th Cir. 2012). LaFranchi has failed to introduce any evidence on any of these points. Accordingly, his claim against defendants Hamblin, Dittman and Wess must be dismissed.

In his opposition brief, LaFranchi suggests that he would like to amend his complaint to add as defendants Hamersma and West, who were involved with defendant Mejchar in making the decision regarding the Hebrew Roots group. Insofar as LaFranchi's request could be construed as a motion to amend, I would deny it. As will be discussed below, the decision to move the group did not violate LaFranchi's right to exercise his religion. Although LaFranchi

has sued only the chaplain, that conclusion applies with equal force to Hamersma and West. Accordingly, any motion to amend the complaint to add these individuals as defendants would be futile.[7]

B. Substantial Burden

Defendants argue that before applying the *Turner* factors, this court must find that LaFranchi has a sincere religious belief and that the decision to move the Hebrew Roots group placed a "substantial burden" on his exercise of that belief. As I discussed at length in the court's June 13, 2011 summary judgment order (dkt. 129) in *Liebzeit v. Thurmer et al.*, 10-cv-170-slc, whether "substantial burden" remains an element that must be proven in a Free Exercise case is a question for which the evolving case law on the subject provides no clear answer. *Id.*, Op. and Order, dkt. 129, at 9-16. *But see Jackson v. Raemisch*, 726 F. Supp. 2d 991, 999-1000 (W.D. Wis. 2010) (noting without discussion that substantial burden was threshold question in Free Exercise case) (Conley, J.). In *Liebzeit*, it was unnecessary to decide that question because I found that the plaintiff had shown a substantial burden. In this case, however, if LaFranchi must meet this threshold requirement, he loses his case from the outset.

As I noted in *Liebzeit*, the court of appeals has defined a "substantial burden" on free exercise rights in different ways, including "one that necessarily bears a direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable," *Civil Liberties for Urban Believers*, 342 F.3d at 761, "puts substantial pressure on an adherent to modify

[7] Not to mention untimely. *See Carroll v. Stryker Corp.*, 658 F.3d 675, 684 (7th Cir. 2011). This court granted LaFranchi leave to proceed almost a year ago, the deadline for filing dispositive motions was February 21, 2012, discovery ends in about two weeks, and trial is scheduled for August 6, 2012.

his behavior and violate his beliefs," *Koger*, (quoting *Thomas v. Review Bd.*, 450 U.S. 707 (1981)), or "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." *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996). In assessing this element, "[t]he 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." *Jackson v. Raemisch*, 726 F. Supp. 2d 991, 999 (W.D. Wis. 2010) (emphasis in original). Thus, to show a substantial burden, the prisoner must offer testimony that explains what his beliefs are and why the decision at issue imposed a burden on those beliefs.

In *Jackson*, 726 F. Supp. 2d at 999-1000, for example, the court found that the plaintiff, who was challenging the prison's prohibition on his praying at work, had met his burden by submitting an affidavit stating that he was a devout, practicing Muslim who personally believed that he would be committing a major sin in Islam if he failed to perform the five daily prayers of "Salah" within a certain time frame, which coincided with his work time. Similarly, in *Liebziet*, I found that the plaintiff, an Odinist, had met his burden of showing that defendant's refusal to permit him to perform the Blot and Sumbel ceremonies with other Odinists imposed a substantial burden on his religion where plaintiff had submitted an affidavit in which he discussed his own belief that group worship in the form of a Blot and a Sumbel was an important way for him to honor the gods and his ancestors. *Id.*, 10-cv-170-slc, dkt. 129 at 20.

Conversely, in *Kaufman v. McCaughtry*, 419 F.3d 678, 683 (7th Cir. 2005), the court found that the plaintiff had not established that the prison's refusal to permit him to form an

atheist study group imposed a significant burden on his practice of atheism, where the plaintiff had "introduced no evidence showing that he would be unable to practice atheism effectively without the benefit of a weekly study group." In particular, noted the court, defendants allowed the plaintiff to "study atheist literature on his own, consult informally with other atheist inmates, and correspond with members of the atheist groups he identified," and the plaintiff "offered nothing to suggest that these alternatives are inadequate." *Id*. *Accord Skenandore v. Endicott*, 2006 WL 2587545, *19 (E.D. Wis. 2006) (plaintiff failed to show substantial burden where he had presented no facts tending to show how a Native American cultural group would provide him with additional and different opportunities to observe his religion than those already offered, which included praying in his cell, possessing religious texts, participating in weekly drum practice, participating in monthly sweat lodge and participating in religious feasts).

LaFranchi falls into this second group of cases. Like the plaintiff in *Kaufman*, he has offered no testimony showing how the exercise of his Hebrew Israelite Messianic Natsarim faith was burdened by the chaplain's decision. Clearly, LaFranchi was unhappy about the decision, but so far as it appears, what he was most unhappy about was having his "Hebrew Roots" study group labeled as a "Christian" group. As noted before, however, this is not enough: LaFranchi must establish *why* this label burdened the exercise of his religion.

Although he has submitted three affidavits, the closest he comes to addressing this question is his statement that "because of the loss of [his] kosher diets, [his] natural salt, [and] being wrongly labeled as Christians in an attempt to strip me of my Hebrew-Israelite faith," as well as "not being able to fellowship with other Hebrew Israelite's of [his] faith to study Torah and [the] Father's Commands," he was traumatized and anxious. *See* Aff. of David LaFranchi,

dkt. 50. It is undisputed, however, that LaFranchi had not been receiving kosher meals at the time of the chaplain's decision, having ceased taking such meals on October 2, 2010. Further, although LaFranchi was aware in September 2011 that he was eligible to submit a new DOC-1090 form changing his designation back to Jewish, which, in turn, would have allowed him to request a kosher diet, he did not do so until February 2012. This evidence indicates that LaFranchi's ability to receive a kosher diet was not genuinely burdened by the decision to move the Hebrew Roots study group. As for natural salts, LaFranchi has submitted no evidence to support his claim that before the chaplain's transfer decision, he was entitled to the use of "natural salt" or to participate in a "salt covenant."[8] To the extent that LaFranchi may be referring to kosher salt, that claim would fail along with his claim related to the deprivation of a kosher diet.

LaFranchi also complains that as a result of the chaplain's classification decision, he was deprived of his ability to meet with his religious leaders (whom I presume to be the Olsons) and fellow Hebrew Roots adherents. This complaint fails for two reasons. First, under the Department's policies, LaFranchi was already allowed the opportunity to possess religious books and literature, request pastoral visits, and engage in individual study and meditation. Further, if he chose to remain under the Jewish umbrella group, LaFranchi would have been allowed to participate in Jewish religious services and other study groups affiliated with the Jewish umbrella group. LaFranchi doesn't say what occurred during the Hebrew Roots study group meetings that was different from these activities or why he could not adequately exercise his religion through

[8] Although there are biblical references to salt covenants between God and man, *see* 2 Chron. 13:5; Num. 18:19; Lev. 2:13, and salt covenant kits are available for wedding ceremonies, *see, e.g.,* *www.marriagesaltcovenant.com*, it is not clear what LaFranchi has in mind.

either individual study or through the group services offered under the Jewish umbrella. Without more, his conclusory assertion that he was denied his ability to meet and study with fellow Hebrew Roots adherents is not enough to show that this practice was essential to the exercise of his faith.

Second, the chaplain's decision did not prevent him from participating in the study group. As an initial matter, to the extent that LaFranchi is complaining about the implosion of the study group which occurred about a month after the chaplain announced her decision, none of the defendants is responsible.[9] Further, even when the group still was intact, LaFranchi was not forbidden from participating in it. What he was forbidden from doing was participating in the Hebrew Roots study group *and* participating in the religious activities exclusively practiced the Jewish umbrella group. But as just discussed, LaFranchi has not offered any testimony regarding which, if any, of those practices were central to his personal exercise of his Hebrew Roots faith. (Clearly, the ability to receive a kosher diet was not.) If the privileges afforded under the Jewish umbrella group were of no importance to LaFranchi's religious practice, then he was not burdened by the chaplain's reclassification decision.

I note that in his brief, LaFranchi mentions being deprived of his ability to participate in annual feasts (it is undisputed that LaFranchi missed the 2011 Passover) and to talk to a rabbi. Again, however, LaFranchi offers no testimony regarding the importance that these practices held for him. Even assuming LaFranchi had offered such testimony, however, it is doubtful that he could show that it was the chaplain's decision that burdened these practices.

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[9] Indeed, on this record, the person who appears to be most responsible for the Olsons' banishment is LaFranchi, who corresponded with them in violation of the non-fraternization rule.

First, LaFranchi could have requested a pastoral visit with a rabbi no matter which umbrella group he was associated with. There is no evidence that he ever requested such visits. Second, LaFranchi had the option of remaining in the Jewish umbrella group, which would have allowed him to attend the 2011 Passover feast and attend services with the rabbi. As already noted, Chaplain Mejchar did not force LaFranchi to choose one umbrella group over the other. What she did was make an assignment decision based on her analysis of the Hebrew Roots theology. This decision altered the constellation of specific practices that LaFranchi previously had enjoyed under the Jewish umbrella group. This then caused LaFranchi to reevaluate his religious preference designation and choose the religion that offered the practices of most importance to him, just like all the other inmates at the institution. Without more, the mere fact that LaFranchi was not offered a choice that he liked is not enough to establish that his religious exercise was substantially burdened.

Before moving on, I note that the categorization dilemma facing Chaplain Mejchar in picking the most appropriate umbrella religious group for Hebrew Roots also seems to have created a litigation paradox for her: because there were valid doctrinal and practice arguments for placing Hebrew Roots in either the Protestant or the Jewish umbrella groups, inmates in the umbrella group she did *not* choose could accuse her of substantially burdening *their* practice of the Hebrew Roots religion. The record implies that some inmates in the Protestant umbrella group were interested in practicing Hebrew Roots, while different inmates in the Jewish umbrella group wanted to keep Hebrew Roots there. It would be sophistical for this court to conclude from this that if everyone can claim to be burdened, then no one actually is burdened; perhaps the most parsimonious solution in this situation would be to grant the sanctuary afforded by the doctrine of qualified immunity. Even so, I will complete the substantive analysis.

C. Application of *Turner* Factors

Let's give LaFranchi the benefit of the doubt and assume that he has established that the temporary removal of the Hebrew Roots study group from the Jewish umbrella group imposed a substantial burden on his exercise of his religion. Allowing LaFranchi to proceed to the next step of the analysis does not seem to save him from summary judgment. It is well-settled that "an inmate is not entitled to follow every aspect of his religion; the prison may restrict the inmate's practices if its legitimate penological interests outweigh the prisoner's religious interests. *Kaufman,* 419 F.3d at 683. As noted above, in assessing the reasonableness of a prison regulation that restricts an inmate's exercise of religion, courts are guided by the four factors identified by the Supreme Court in *Turner*.

I begin at the end because the State has conceded that the third and fourth factors favor LaFranchi. The decision in September 2011 to return the Hebrew Roots study group to the Jewish umbrella group shows that it was unnecessary to move the group to the Protestant umbrella group nine months earlier. So far as it appears from post-hoc events and the defendant's concession, leaving the Hebrew Roots study group where it was would not have imposed an additional strain on staff or institutional resources.

So, given that the group didn't *have* to be moved in January 2011, let's look at why Chaplain Mejchar decided to move it: she explains that she was attempting to place the group into the umbrella group where she believed it would fit best. Based on what she had heard and had been told about what the Olsons were teaching, the Hebrew Roots inmates' expressed dissatisfaction with the Jewish services being offered by Rabbi Stallman, and the interest of some inmates under the Protestant umbrella to participate in the Olsons' study group, Mejchar

concluded that it was appropriate to move the Hebrew Roots group to the Protestant umbrella group.

The only evidence LaFranchi has to show this decision was irrational are the purported emails from the Olsons, in which they questioned the appropriateness of this change on the ground that Hebrew Roots adherents are not Christians. Fair enough; but it is undisputed that neither the Olsons nor LaFranchi claim to be Jews. Indeed, LaFranchi's evidence includes this observation by the Olsons:

> There was extreme difficulty in classifying our study group since it was apparent, right from the beginning of the approval process, that we did not fall into any of the State's classifications.
>
> Dkt. 49, exh. 1, at 3.

Charged with categorizing a religious group that had tenets and practices in common with two umbrella religious groups but which was not congruent with either, it is hard to see how Chaplain Mejchar can be found to have acted in a constitutionally unreasonable manner by choosing either one. One could even argue that in light of the feedback Chaplain Mejchar had received, it was logical to give the Hebrew Roots group a test run through both the Christian and Jewish umbrella religious groups to determine which was the closer fit. As noted in the previous section, one also could predict that no matter what Chaplain Mejchar decided, some Hebrew Roots adherents likely would agree with her and others would not. Along these lines, LaFranchi's disagreement with Chaplain Mejchar's conclusion that Hebrew Roots was more Christian than Jewish does not, without more, establish that her decision was unreasonable. *Accord Van den Bosch v. Raemisch*, 658 F.3d 778, 788 (7th Cir. 2011) ("Plaintiff's disagreement with defendant Westfield's assessment [that certain passages in newsletter encouraged distrust

of prison staff and threatened prison security] is insufficient to establish that confiscation of the newsletter was not reasonably related to legitimate penological interests."). If it did, then Mejchar's decision to move the study group back under the Jewish umbrella could be vulnerable to the same First Amendment challenge by a Hebrew Roots inmate who preferred the Protestant umbrella. It seems plain that, so long as the chaplain was acting in good faith pursuant to a legitimate prison policy, then she did not violate the First Amendment.

This leads to a question posed by the Olsons: why didn't Chaplain Mejchar create a new Hebrew Roots umbrella religious group? The answer circles back to the reasons that DOC created umbrella groups in the first place: the more that DOC divided the available religious resources, the less any inmate would receive. As defendants point out, DOC has only so many volunteers, and only so much staff and space available to accommodate the widely-varying religious needs of its inmates. Adding more groups to the list of already-recognized umbrella religious groups would further divide DOC's limited resources to the point that inmate opportunities for religious practice actually would be diminished, rather than enhanced. Although it is not directly relevant to the instant analysis, let's play out the hypothetical hand: if DOC or RGCI had put the Hebrew Roots adherents into their own umbrella group, then once the Olsons were banned from the institution, there would have been no opportunity for the group members to worship as a group or to meet with any volunteer spiritual leader. At least as members of one of the seven existing umbrella groups, Hebrew Roots adherents have access to additional resources and personnel to enhance their practice of their religion.

This court has endorsed DOC's use of umbrella religious groups as a fair and efficient way to allocate increasingly scarce resources among an increasingly diverse inmate population. *See*

Kaufman v. McCaughtry, 422 F. Supp. 2d 1016, 1019 (W.D. Wis. 2006); *Charles v. Verhagen*, 220 F. Supp. 2d 937, 940 (W.D. Wis. 2002). Although the Court of Appeals for the Seventh Circuit has not considered the precise umbrella group policy at issue here, that court has indicated that gathering the various religious denominations represented at a prison into umbrella groups for purposes of festal occasions is a legitimate means of administering the limited resources available for hosting such occasions. *Mack v. O'Leary*, 80 F.3d 1175, 1181 (7th Cir. 1996) (prison's grouping of denominations into four umbrella groups for purposes of festal occasions "is all that the law could reasonably be thought to require of so religiously heterogeneous a prison."). DOC has sorted the various sects and denominations represented by its inmate population into seven umbrella groups (three more than in *Mack*). DOC also permits inmates who find these groups unsatisfactory to practice their religious faith on their own, through individual study, personal meditation, religious books and literature, approved religious property, pastoral visits, correspondence with fellow believers and other approved individual religious observances in their living quarters. This seems constitutionally adequate. In any case, LaFranchi has not argued that his desired religious practices were not sufficiently accommodated when the Hebrew Roots group was classified under the Jewish umbrella group. In other words, LaFranchi does not challenge the reasonableness of the umbrella policy on its face, only as applied.

Applying the second *Turner/O'Lone* factor to this situation further establishes the reasonableness of Chaplain Mejchar's decision. Factor No. 2 asks whether LaFranchi had alternative means of exercising his right to practice his religion. The question is not whether LaFranchi had alternative means of exercising the particular practice in question, participating in the 2011 Passover, for example, but rather whether he had alternative means of exercising his

right to practice his religion generally. *O'Lone*, 482 U.S. at 352 (finding that although Muslim inmates had no alternative means of attending services of Jumu'ah, they retained ability to participate in other Muslim religious ceremonies). Here, although LaFranchi's choice of Hebrew Roots on his January 2011 DOC-1090 meant that he lost his right to attend the celebratory feast of Passover, he had other means of exercising his Hebrew Roots faith: as just noted, he could possess religious books and literature, request pastoral visits, engage in individual study and meditation and participate in the Hebrew Roots study group, provided that there were volunteers to lead it. As the Supreme Court observed in *Turner*, 482 U.S. at 90, where other avenues remain available for the exercise of an inmate's religious faith, courts should be particularly conscious of the measure of judicial deference owed to correction officials. Although the alternatives open to LaFranchi may not have been ideal, they were available, which is all that is required under *Turner*. *Overton v. Bazzetta*, 539 U.S. 126, 135 (2003).

In sum, I find that LaFranchi's First Amendment rights were not violated by the temporary classification of his Hebrew Roots group under the Department's Protestant umbrella group, even though it would not have imposed any additional burden on RGCI to classify the Hebrew Roots study group under the Jewish umbrella group. Essentially, the now-repealed reclassification was simply a judgment call made in good faith by a trained professional. Decisions like this are the sort of "difficult and sensitive matter[] of institutional administration" that the Supreme Court has cautioned is best left to prison administrators. *O'Lone*, 482 U.S. at 353 (quoting *Block v. Rutherford*, 468 U.S. 576, 588 (1984)). Chaplain Mejchar had two equally viable umbrella groups into which to place the Hebrew Roots study group and she has provided a reasonable explanation for why she chose Protestant over Jewish. Because that explanation is

rationally related to legitimate penological interests, LaFranchi's Free Exercise claim fails. *Cf. Aziyz v. Tremble*, 2008 WL 282738 (M.D. Ga. 2008)(unpublished opinion) (defendant prison officials did not violate plaintiff's First Amendment rights when they enforced GDOC's rule prohibiting Suni Muslims from wearing Kufi prayer caps, even though GDOC later rescinded the prohibition: the rule against caps had not been irrational and rescission of the rule did not establish otherwise).

D. Damages and Qualified Immunity

For completeness's sake, let's assume, *arguendo*, that Chaplain Mejchar's decision to move the Hebrew Roots study group to the Protestant umbrella violated LaFranchi's rights under the Free Exercise clause. The most that LaFranchi would be able to recover would be nominal damages. He cannot recover compensatory damages because he has not shown a physical injury. 42 U.S.C. § 1997e(e) (prisoner cannot bring claim for mental or emotional injury absent prior showing of physical injury); *Meyers v. Teslik*, 411 F. Supp. 2d 983, 991 (W.D. Wis. 2006). Further, he cannot recover punitive damages because there is no evidence that Chaplain Mejchar acted with intent to harm him or with callous indifference to his First Amendment rights. *Soderbeck v. Burnett County*, 752 F.2d 285, 290 (7th Cir. 1985); *Wallace v. Mulholland*, 957 F.2d 333, 337 (7th Cir. 1992). To the contrary, although the chaplain might have erred, the record shows that she was making a good faith effort to accommodate LaFranchi and the other Hebrew Roots inmates while at the same time executing her duty to place the study group under the most appropriate umbrella group. This leaves LaFranchi able to recover only nominal damages; $1 is the norm. *Kyle v. Patterson*, 196 F.3d 695, 697 (7th Cir. 1999).

Even then, the doctrine of qualified immunity should shield Chaplain Mejchar from liability for this dollar. Qualified immunity "gives public officials the benefit of legal doubts" by ensuring that "officers are on notice their conduct is unlawful" before they are subject to suit. *Saucier v. Katz*, 533 U.S. 194, 206 (2001). Defendants are to be denied qualified immunity only when the rights that have been violated are sufficiently particularized to have put potential defendants on notice that their conduct was unlawful. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

As discussed above, there is no clearly established law holding that the use of umbrella groups as a means of accommodating (or limiting) an inmate's desired religious practices violates the Free Exercise Clause. To the contrary, the court's decision in *Mack* implicitly approves the use of such groups. Accordingly, even if LaFranchi's First Amendment rights were violated by the short-lived change in umbrella groups, Chaplain Mejchar is immunized from liability for any damages sustained by LaFranchi as a result of that violation. To the extent that LaFranchi's lawsuit may be distilled down to a disagreement over *which* umbrella group should have housed his Hebrew Roots faith, we circle back to the paradox noted earlier in this opinion: whichever choice Chaplain Mejchar made, she was subject to second-guessing by the subset of practitioners that disagreed with her. I am aware of no case that addresses this question or that would have alerted Chaplain Mejchar that the Jewish umbrella group was the proper–indeed, the constitutionally *required*–designation for the Hebrew Roots group. Lacking clear guidance, Chaplain Mejchar weighed the information available to her, consulted her colleagues, then made a good faith decision that might have been short-lived but which was not irrational. A difference of opinion about the result should not subject Chaplain Mejchar to liability under the First Amendment.

ORDER

IT IS ORDERED that:

(1) Defendants' motion for summary judgment (dkt. 42) is GRANTED;

(2) Plaintiff's motion for the appointment of counsel (dkt. 59) is DENIED; and

(3) The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 27th day of June, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge