IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES J. KAUFMAN,

Plaintiff,

v.

GARY R. McCAUGHTRY, SGT. McCARTHY, JAMES MUENCHOW, RENEE RONZANI, SANDY HAUTAMAKI, JOHN RAY, CYNTHIA O'DONNELL, and JAMYI WITCH,

Defendants.

OPINION AND ORDER

03-C-027-C

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This is a civil action for declaratory, injunctive and monetary relief brought pursuant to 42 U.S.C. § 1983. Plaintiff James K. Kaufman is a prisoner at the Jackson Correctional Institution. He contends that 1) defendants McCaughtry, McCarthy, Muenchow, Ronzani, Hautamaki, Ray and O'Donnell violated his First Amendment rights when they allowed eight pieces of mail to be opened outside his presence when he was incarcerated at the Waupun Correctional Institution and 2) defendants McCaughtry and Witch violated his First Amendment rights under the free exercise and establishment clauses when they refused to allow him to form an atheist group at the Waupun Correctional Institution. This court

has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Before the court is defendants' motion for summary judgment and plaintiff's motion for reconsideration of the magistrate judge's denial of his motion to compel discovery. I conclude that a reasonable jury could not find that plaintiff's mail was legal in nature or that the opening of these mailings was anything more than mere negligence. I conclude also that plaintiff has no viable free exercise claim because he has not shown that he met the neutral criteria for forming a new religious group or that not being able to have weekly group meetings imposes a substantial burden on his practice of atheism. Furthermore, plaintiff has no establishment clause claim because the rule that defendants use to help inmates establish new religious groups does not advance religion but serves a legitimate secular purpose by lifting a burden for religious practice. Therefore, I will grant defendants' motion for summary judgment. As to plaintiff's motion to compel discovery, the evidence plaintiff seeks would not affect the outcome of this case. I will deny plaintiff's motion to reconsider his motion to compel discovery as moot.

From the proposed findings of fact and the record, I find the following material facts to be undisputed.

UNDISPUTED FACTS

A. The Parties

Plaintiff James J. Kaufman resided at the Waupun Correctional Institution from February 12, 2002, until his transfer to the Jackson Correctional Institution on February 27, 2003. The following defendants work at the Waupun Correctional Institution: (a) Gary McCaughtry, Warden; (b) James Muenchow, Institution Complaint Examiner; (c) Renee Ronzani, Institution Complaint Examiner from March 10, 2002 to August 23, 2003; (d) Jamyi Witch, Chaplain; and (e) Todd McCarthy, Officer 3 (sergeant) in the mail room. The following defendants work for the Wisconsin Department of Corrections: (a) Sandra Hautamaki and John Ray, Corrections Complaint Examiners; and (b) Cynthia O'Donnell, Deputy Secretary.

B. Legal Mail

Procedure number 807.4 establishes guidelines for the processing of inmate and staff incoming and outgoing mail. These guidelines govern staff who work in the Waupun Correctional Institution mail room. As sergeant in the mail room, defendant McCarthy functions as a lead worker and supervises all officers and staff in the mail/property room. McCarthy or other qualified staff train mail room staff on the rules and procedures regarding inmate mail delivery and processing. Staff separate inmate legal mail from non-exempt mail. (Wisconsin law defines legal mail as inmate correspondence with any of the parties listed in Wis. Admin. Code § DOC 309.04(3)(a)-(j). These parties include, among others, an

attorney, the attorney general or an assistant attorney general, an investigative agency of the federal government and the clerk or judge of any state or federal court.) If inmate mail clearly falls into the category of legal mail, mail room staff consider it "exempt" and do not open it or read it for inspection except in the presence of the inmate unless the security director believes that the mail contains contraband. If mail room staff open legal mail in the presence of an inmate, they are authorized to do so only to determine whether the mail contains contraband or whether the sender is misrepresenting the correspondence. If staff believe the mail is something other than a legal document, they may read the mail.

If an envelope does not show clearly that it comes from one of the parties listed in Wis. Admin. Code § DOC 309.04(3)(a)-(j), mail room staff will open and inspect it. Mail room staff may consider the correspondence "exempt" even if it is from a lawyer who is not representing an inmate so long as it is clear from the envelope that the correspondence is from a lawyer.

From April 2002 through October 2002, plaintiff received six pieces of correspondence that mail room staff opened outside his presence. On April 5, 2002, plaintiff received correspondence from Steele Legal Services. The outside envelope showed STEELE, LEGAL SERVICES, E20355 CTH ND, Augusta, WI 54722 as the return address. Steele Legal Services did not represent plaintiff in any legal action. In response to plaintiff's

complaint about the opened letter, defendant Muenchow, institution complaint examiner, found that the correspondence was "clearly identifiable as being from an attorney" and should have been opened in plaintiff's presence. Muenchow concluded, however, that plaintiff was not harmed as a result of this error and he affirmed the decision regarding plaintiff's complaint. Defendant McCaughtry accepted Muenchow's recommendation.

On April 15, 2002, plaintiff received a letter from Langrock, Sperry, & Wool, LLP. The envelope did not identify the correspondence as confidential, coming from a lawyer. Langrock, Sperry, & Wool, LLP did not represent plaintiff in any legal action.

On May 10, 2002, plaintiff received a letter from the Eau Claire County Sheriff's Department in response to an open records request he had made. The envelope did not show the correspondence as confidential or as coming from a lawyer.

On July 5, 2002, and September 12, 2002, the United States Department of Justice sent plaintiff letters containing information about filing a civil rights action. The return address stated: "U.S. Department of Justice, OEO, official business, penalty for private use $300." Between the July and September letters, Waupun Correctional Institution made it clear that staff should not open plaintiff's letters from the United States Department of Justice unless they did so in plaintiff's presence. Waupun Correctional Institution staff stamped the September 12, 2002 letter with a note stating "exempt correspondence, must be opened in the presence of staff." Despite this stamp, mail room staff opened the

September 12, 2002 letter inadvertently. Mail room staff attached the opened envelope to a memorandum to plaintiff advising him that they had opened the envelope inadvertently. The United States Department of Justice has never represented plaintiff in any legal action.

On October 3, 2002, the American Civil Liberties Union sent plaintiff a letter regarding his request that the organization file an amicus brief in one of plaintiff's pending cases. The envelope showed the return address: "ACLU, American Civil Liberties Union, National Headquarters, 125 Broad Street, New York, New York 10004-2400." Under the return address is a stamp that states "communications." The envelope gave no other indication that the correspondence was confidential or from a lawyer. The American Civil Liberties Union did not represent plaintiff in a legal action.

On two other occasions, plaintiff sent out correspondence that the post office returned to Waupun Correctional Institution. The post office returned for insufficient postage one piece of correspondence that plaintiff had sent to the United States District Court in Milwaukee, Wisconsin, dated June 8, 2002. The correspondence contained documents to be filed in a case plaintiff was pursuing in that court. The post office returned another letter plaintiff had written to Assistant Attorney General Mary Batt, Wisconsin Department of Justice, dated July 15, 2002 for failure to put the correct zip code on the envelope. Batt was opposing counsel, representing the warden in a case plaintiff had filed in state court. Mail room staff opened both pieces of the returned correspondence outside

plaintiff's presence.

On September 21, 2001, plaintiff was allowed to proceed on his civil rights case entitled Kaufman v. Smith, Case No. 00-C-1379 in the Eastern District of Wisconsin. In that case, plaintiff contended that staff at the Oshkosh Correctional Institution had violated his First Amendment rights when they opened his mail from the American Civil Liberties Union and Miller, James, Miller, Wyly & Hornsby, LLP outside his presence. On July 16, 2003, the court granted defendants' motion for summary judgment on plaintiff's claim.

C. Atheist Group

Plaintiff defines atheism as "someone who does not believe in the supernatural or in any gods, does not believe in rituals and prayer, basically believes in what you can see and test through science or through your own observations." He states also that atheism is a "communal type thing," with no hierarchy or power structure. Plaintiff believes that atheists have ethics derived from society, history and personal experience that help believers determine what is right and wrong.

Department of Corrections guidelines, 309 IMP #6, permit the formation of umbrella religious groups that are designed to appeal to a wide range of religious beliefs within a given religious group or faith. For example, the Protestant umbrella group is intended to meet the needs of inmates who are Protestant, Lutheran, Baptist and Methodist. Religious groups

must be led by a chaplain, approved spiritual leader or outside volunteer. They may not be led by inmates. To coordinate congregate services and study groups and accommodate inmates' religious needs, the institution requires inmates to designate their religious preference, using Department of Corrections guidelines and policies.

On March 12, 2002, plaintiff signed a religious preference form, designating his religious preference as Wiccan because defendant Witch had told him that this was necessary in order to attend the pagan study group. On several occasions, plaintiff spoke with Witch about atheism. Plaintiff told Witch that atheism is not a religion and that he wanted to form a group of inmates who chose not to worship a god.

On September 3, 2002, in accordance with Waupun Correctional Institution procedure, plaintiff completed and signed a form requesting a new religious group for atheists and submitted the form to Witch. Plaintiff's request included a list of resources and information about various atheist organizations that prison officials could contact for more information. Plaintiff altered the "Request for New Religious Practice" form by crossing off all references to "religion." Plaintiff stated:

> I request that a group be formed for atheists within the institution, for the purpose of study and education. Every atheist has the right to determine his own ideas; to express his beliefs in teaching and practice; to assemble for purposes of learning and instructions; to educate others interested in atheism; and to promote a more thorough understanding of all religions, their origins, and their histories. The proposed group should meet once each week, for discussion and learning about the principles and practices which atheism is

> based upon. Even Atheism falls under this right [of free exercise]. Atheists are entitled to the same freedoms of movement, assembly, and speech, as those inmates who profess a religion.

Upon receipt of an inmate's written request to participate in a new religious practice, the warden and chaplain or any other staff person with religious training decides whether to approve the request, using the following criteria: 1) whether the request is motivated by religious beliefs; 2) whether other inmates with common ethical, moral or intellectual views share the interest in forming a new religious group; and 3) whether there is volunteer support to lead the group.

Given the limited facilities and staff in correctional institutions, it would be difficult and impractical to provide separate accommodations for every religious sect or to establish a new religious umbrella group for one inmate. Although Witch recalls speaking about the moral and spiritual aspect of atheism with two inmates other than plaintiff, plaintiff was the only inmate at the Waupun Correctional Institution who expressed an interest to Witch in forming or participating in an atheist group.

On September 8, 2002, Witch recommended to her supervisor that he deny plaintiff's request for a new religious practice at Waupun Correctional Institution because plaintiff did not "meet the requirements for a new religious practice." She stated that it would be appropriate to consider plaintiff's request under the "social group/organization" requirements

of Wis. Admin. Code § DOC 309.365(4).

In accordance with Witch's suggestion, plaintiff submitted a request for a new inmate activity group on September 15, 2002, for approval by the warden, who has the sole authority to approve such requests under Wis. Admin. Code § DOC 309.365(5).

Plaintiff sought a weekly meeting of persons interested in humanism, atheism and free speaking. The group's objectives would be "[t]o stimulate and promote Freedom of Thought and inquiry concerning religious beliefs, creeds, dogmas, tenets, rituals, and practices. To educate and provide information and literature on all religions, including their origins and history. To teach a progressive life stance, Free of Supernaturalism, to encourage critical thinking between fact and legend." Defendant McCaughtry denied plaintiff's request on September 19, 2002, on the ground that the Waupun Correctional Institution was not forming new inmate activity groups at the time.

On November 14, 2002, plaintiff submitted an "Interview/Information Request" form, seeking a decision on his request to form an atheist group. Darrell Aldrich, unit manager for the chapel, told plaintiff that his request for a new religious group had been forwarded to McCaughtry with a recommendation that the content of his request did not meet the criteria set out in Department of Corrections policy 309. On November 18, 2002, Aldrich recommended to McCaughtry that he deny plaintiff's request for a new religious activity because it did not meet the criteria for an umbrella religion, congregate or study

group and because there was no mention of other interested inmates or volunteer support, only a list of literature. On November 19, 2002, McCaughtry denied plaintiff's request to form a new religious umbrella group on the ground that it did not meet the criteria outlined in Department of Corrections 309 IMP #6 (religious beliefs and practices) and #30 (procedure for volunteers).

OPINION

A. Legal Mail

Plaintiff argues that because defendants McCaughtry, McCarthy, Muenchow, Ray, O'Donnell, Hautamaki and Ronzani allowed the opening of his "legal mail" outside his presence on several occasions, they violated his rights under the First and Fourteenth Amendments and his rights under Wis. Admin. Code § DOC 309.04(3)(a)-(j). Defendants contend that because plaintiff raised a similar issue in Kaufman v. Smith, Case No. 00-C-1379, he is precluded from arguing the same issue in the present case under the doctrine of collateral estoppel. In the alternative, defendants argue that they are entitled to summary judgment because each of the eight pieces of mail at issue was either not privileged, not identified as privileged or opened accidentally.

Defendants' issue preclusion argument is unavailing. Although some of the letters involved in the Kaufman v. Smith action are *similar* to the letters involved in the present

case, the letters are not the *same*. Defendants cite Adair v. Sherman, 230 F.3d 890, 896 (7th Cir. 2000), in support of preclusion, but in Adair, the court barred the plaintiff from collaterally attacking the valuation of the *same* car that a previous court had valued. See also Miller Brewing Company v. Jos. Schlitz Brewing Co., 605 F.2d 990, 991 (7th Cir. 1979) (applying collateral estoppel in a second trademark action by plaintiff to enforce the *same* trademark against a different defendant). Because the letters are not the same, it is necessary to decide the merits of plaintiff's claim that defendants violated his constitutional rights when they permitted the opening of the eight pieces of mail at issue outside his presence.

The parties dispute whether the named defendants were personally involved in opening plaintiff's mail outside his presence. It is unnecessary to address this dispute because plaintiff's claim fails for his failure to show that the mail at issue was constitutionally protected.

As a general rule inmate mail can be opened and read outside the recipient's presence, Martin v. Brewer, 830 F.2d 76, 77 (7th Cir. 1987), but legal mail may be subject to somewhat greater protection. Inmates possess a heightened interest in maintaining the confidentiality of privileged communications about private legal matters. Allowing prison officials to read such mail would chill a prisoner's access to the courts. Harrod v. Halford, 773 F.2d 234, 235 (8th Cir. 1985); see also Wolff v. McDonnell, 418 U.S. 539, 577 (1974) (upholding prison procedure of inspecting but not reading legal mail in part because no

threat of chilled communications); Bach v. Illinois, 504 F.2d 1100, 1102 (7th Cir. 1974) (opportunity to communicate privately with attorney is vital ingredient of access to courts). With respect to the delivery of protected legal mail, a prison adequately protects an inmate's constitutional interests if it opens and inspects such mail only in the presence of the inmate to insure that the mail is not read. Wolff, 418 U. S. at 577; Gaines, 790 F.2d at 1306.

However, not all legal mail warrants added protection. For example, most mailings from courts to litigants are public documents, which anyone, including prison personnel, could inspect in the court's files. Martin, 830 F.2d at 78. Therefore, official mail sent from a court clerk to an inmate can be opened outside the inmate's presence without infringing the inmate's privacy rights. Antonelli v. Sheahan, 81 F.3d 1422, 1431 (7th Cir. 1996). The extra protections afforded legal mail are reserved generally for privileged correspondences between inmates and their attorneys. Wolff, 418 U.S. at 574; Antonelli, 81 F.3d at 1432.

Except for the letters from Steele Legal Services, the United States Department of Justice and the Wisconsin Department of Justice, it is undisputed that the envelopes at issue did not indicate that the correspondence was confidential or from a lawyer. Prisons do not violate the constitutional rights of inmates by adopting administrative procedures that provide that only mail bearing specific markings must be opened in front of the inmate. Wolff, 418 U.S. at 576-77 ("We think it entirely appropriate that the State require any [attorney-inmate] communications to be specially marked as originating from an attorney,

with his name and address being given, if they are to receive special treatment."). Even correspondence from lawyers can be opened outside an inmate's presence if it is not marked as required by the policy. Martin, 830 F.2d at 78. Furthermore, protection of mail as private requires more than just an address of a legal entity on an envelope, such as a court, law firm, sheriff's department or government agency. Id. (noting that much institutional mail is "junk mail --- not a personal communication to a known addressee and not containing any materials intended for his eyes only"; whether such mail is classified as general correspondence or special mail has little to do with objects of First Amendment).

Even if I assume that the correspondence from Steele Legal Services, the United States Department of Justice and the Wisconsin Department of Justice was clearly from lawyers, plaintiff must show an *ongoing* interference with legal mail to state a First Amendment claim, not simply a few instances of negligence. Castillo v. Cook County Mail Room Dept., 990 F.2d 304, 306 (7th Cir. 1993); Rowe v. Shake, 196 F.3d 778, 782 (7th Cir. 1999). Plaintiff fails to adduce evidence showing that the opening of these mailings was more than mere negligence. Therefore, it is of no consequence that defendants should not have permitted the opening of the correspondence from the United States Department of Justice. It is undisputed that after plaintiff received the first letter from the United States Department of Justice, defendants clarified their policy to provide that letters from the department were to be opened in the presence of the inmate and that mail room staff opened

the second letter inadvertently. Plaintiff has not adduced any evidence to show whether defendants opened *all* his legal mail outside his presence or only a small fraction. At this stage of the proceedings, plaintiff should have that evidence. Summary judgment is the "put up or shut up" moment in a lawsuit. See, e.g., Johnson v. Cambridge Industries, Inc., 325 F.3d 892, 901 (7th Cir. 2003). Plaintiff's case is not governed by Castillo, 990 F.2d at 306, a case in which the court of appeals held that the district court had erred in granting a motion to dismiss because the record was too undeveloped to allow the factfinder to determine whether all of plaintiff's legal mail was opened or only a small fraction.

In his motion to reconsider the magistrate judge's denial of his motion to compel discovery, plaintiff asks for the number of complaints filed against defendants regarding the opening of legal mail; plaintiff argues that this information will show a pattern of opening legal mail. Plaintiff asks also for information regarding who opened his legal mail and when. Even if plaintiff obtained such information, it would not show that defendants opened all of *his* legal mail. Plaintiff does not need to discover information about the pattern of practice as to his own legal mail; if he has such evidence, it is his burden to include it as part of his proposed findings of fact. He did not do this. From the evidence he has provided, a reasonable jury could not conclude that defendants opened plaintiff's "legal mail" frequently.

Plaintiff cites State ex rel. Peckham v. Krenke, 229 Wis.2d 778, 601 N.W.2d 287 (Ct. App. 1999), to support his claim that his correspondence from the Wisconsin

Department of Justice should have been opened in his presence even though it was returned for lack of a proper zip code, but the case is not on point. In Peckham, the court held that because the record did not contain any pattern or practice of opening and inspecting plaintiff's incoming legal mail outside her presence and because the mail at issue did not involve any communication between plaintiff and her lawyer or the courts, the opening and inspection of plaintiff's incoming legal mail outside her presence did not violate her constitutional rights. Id. at 294. Plaintiff's correspondence with the Wisconsin Department of Justice was neither communication with *his* attorney nor an example of a pattern or practice of opening legal mail improperly.

Finally, to the extent that plaintiff argues that defendants violated his right of access to the courts under the Fourteenth Amendment, plaintiff has not shown that he was prejudiced by defendants' actions. In order to state an access to the courts claim, a plaintiff must allege facts from which an inference can be drawn of "actual injury." Lewis v. Casey, 518 U.S. 343 (1996). This principle derives ultimately from the doctrine of standing, id., and requires a plaintiff to demonstrate that he is or was prevented from litigating a non-frivolous case. Id. at 353 nn.3-4 and related text; Walters v. Edgar, 163 F.3d 430, 434 (7th Cir. 1998). Plaintiff fails to make such a showing. In fact, it is undisputed that none of the eight pieces of mail constituted correspondence between plaintiff and a lawyer representing him in a cause of action. Because no reasonable jury could conclude that

defendants violated plaintiff's constitutional rights when they opened the eight pieces of mail outside his presence, I will grant defendants' motion for summary judgment on this claim. Because I find no constitutional violation on the part of the defendants, I will not exercise supplemental jurisdiction on plaintiff's state law claim that defendants violated Wis. Admin. Code § DOC 309.04(3). 28 U.S.C. § 1367(c)(3).

B. Atheist Group

Plaintiff's First Amendment challenge to the denial of his request to form a group for atheists raises two questions. 1) When defendants Witch and McCaughtry determined that persons interested in studying or practicing atheism are not entitled to the same opportunities as persons studying or practicing Catholicism or Islam or some other religion, did they violate plaintiff's rights under the free exercise clause? 2) Do defendants promote religion in violation of the establishment clause when they approve religious group requests more readily than non-religious group requests?

1. Free exercise clause

Prisons must afford prisoners reasonable opportunities to exercise the religious freedom guaranteed by the First Amendment without fear of penalty. O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987). The parties dispute whether the free exercise clause

applies to plaintiff's case because it is unclear whether atheism qualifies as a religion in need of protection under the free exercise clause. Although this case does not require an answer to that question, I note that the Court of Appeals for the Seventh Circuit has stated that atheism is a form of religion for Title VII purposes. Reed v. Great Lakes Companies, Inc., 330 F.3d 931, 934 (7th Cir. 2003) ("If we think of religion as taking a position on divinity, then atheism is indeed a form of religion."); see also Fleischfresser v. Directors of School Dist. 200, 15 F.3d 680, 688, nn.5, 6 (7th Cir. 1994) (where district court has before it one who swears or (more likely) affirms that he sincerely and truthfully holds certain beliefs that comport with general definition of religion, court is comfortable that those beliefs represent his religion and that general working definition of religion for free exercise purposes is any set of beliefs addressing matters of "ultimate concern" occupying "place parallel to that filled by God" in traditionally religious persons) (citing Welsh v. United States, 398 U.S. 333, 340 (1970)); Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (religion does not have to be theistic in nature to benefit from constitutional protection).

Even if I assume that plaintiff's belief in atheism qualifies as a religion, plaintiff's free exercise claim fails for two reasons: 1) plaintiff cannot show that defendants' conduct violated his rights under the free exercise clause; and 2) plaintiff has not shown that defendants' conduct imposed a substantial burden on the practice of his atheism. A prison procedure will not violate the free exercise clause of the First Amendment if it is neutral and

generally applicable even if it compels activity forbidden by an individual's religion, Employment Division, Oregon Dept. of Human Resources v. Smith, 494 U.S. 872, 880-82 (1990), provided that it is related reasonably to a legitimate, penological interest. O'Lone, 482 U.S. at 349 ("When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").

According to Wis. Admin. Code § DOC 309.61(2)(a), a request for a new religious practice that involves others or that affects the inmate's appearance or institution routines must meet the following criteria: 1) the request must be in writing; 2) the request must state that the inmate professes or adheres to a particular religion; and 3) the request must specify the practices of the religion in which the inmate requests permission to participate. Defendants consider an inmate's religious motivation, other inmate interest and available volunteer support when determining whether an inmate can form a new religious umbrella group. According to Wis. Admin. Code § DOC 309.61(d), in determining whether an inmate's request is motivated by religious beliefs, the warden may not consider: 1) the number of persons who participate in the practice; 2) the newness of the beliefs or practices; 3) the absence from the beliefs of a concept of a supreme being; or 4) the fact that the beliefs are unpopular. However, the warden may consider whether there is literature stating religious principles that support the beliefs and whether the beliefs are recognized by a group of persons who share common views. Wis. Admin. Code DOC § 306.61(c). If, in

conjunction with the chaplain or other designated staff person, the warden determines that the request is motivated by religious beliefs, he must grant the request so long as it is consistent with the orderly confinement, security and fiscal limitations of the institution. Wis. Admin. Code § DOC 309.61(f).

These criteria appear facially neutral on their face. The requirements do not discriminate against "some or all religious beliefs or regulate[ ] or prohibit[ ] conduct because it is undertaken for religious reasons." Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532 (1993). However, "facial neutrality is not determinative" of a First Amendment free exercise clause claim. Id. at 534. A court must also consider the operation of the rule or procedure. Id. at 535.

Plaintiff has not adduced any evidence showing that defendants would have treated his request differently from any other request for a religious group that did not meet all the criteria for forming a new religious umbrella group. Plaintiff has adduced no evidence showing that other inmates were interested in being part of the group or that a qualified volunteer would have been available to lead the proposed atheist group. Because plaintiff did not meet all the criteria for forming a new religious umbrella group, no reasonable jury could find that defendants discriminated against his religious beliefs.

Plaintiff's free exercise claim fails also because even if he had met the criteria to form an atheist group, he has the burden under the free exercise clause to show that the prison

policy imposes a substantial burden on the practice of atheism. "To show a free exercise violation, the religious adherent . . . has the obligation to prove that a governmental regulatory mechanism burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates." Graham v. Commissioner, 822 F.2d 844, 850-51 (9th Cir. 1987); Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) (the religious exercise inquiry is whether government has placed substantial burden on the observation of *central* religious belief or practice). The burden must be substantial and more than a mere inconvenience. Graham, 822 F.2d at 851. Plaintiff fails to adduce any evidence showing that his inability to meet weekly with other atheists imposes a substantial burden on the practice of his atheism. He merely states that group assembly is an essential part of the right to free exercise and that atheism is a "communal" thing. This is not enough to show that weekly meetings with other inmates who share his views are essential to the practice of his atheism. I conclude that plaintiff cannot succeed on his free exercise claim because he has not shown that he met the neutral criteria for forming a new religious group or that defendants' denial of weekly group meetings imposes a substantial burden on his practice of atheism.

2. Establishment clause

The First Amendment to the United States Constitution prohibits Congress from enacting laws "respecting an establishment of religion." Although it is now well settled that the clause applies to any government action and not just to laws of Congress, see Glassroth v. Moore, 335 F.3d 1282, 1294 (11th Cir. 2003) (citing cases), the Supreme Court has struggled to give meaning to the establishment clause in a way that accurately reflects its purpose and does not clash with the protections of the free exercise clause of the First Amendment. In Everson v. Board of Education, 330 U.S. 1, 16 (1947), the Supreme Court adopted the view of Thomas Jefferson in concluding that the clause "was intended to erect 'a wall of separation' between church and State." In Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), the Court adopted a more specific test in determining whether the government has violated the establishment clause: whether the government has acted with a sectarian purpose, whether the primary effect of the conduct is to advance or inhibit religion and whether the conduct fosters "an excessive government entanglement with religion." Although the Court of Appeals for the Seventh Circuit continues to view the Lemon test as controlling, it has all but ignored the "excessive entanglement" portion of the test. E.g., Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000); Freedom from Religion Foundation, Inc. v. City of Marshfield, 203 F.3d 487 (7th Cir. 2000); Freedom from Religion Foundation, Inc. v. Bugher, 249 F.3d 606, 611 (7th Cir. 2001) (citing Agostini v. Felton, 521 U.S. 203 (1997) (entanglement prong of Lemon could be considered aspect of

second prong's "effect" inquiry in school aid cases).

For the purpose of deciding this motion, I assume that the Waupun Correctional Institution's "social groups or organizations" are governed by Wis. Admin. Code § DOC 309.365 and that the rule provides a vehicle for inmates to request new activity groups, religious or otherwise. Wis. Admin. Code § DOC 309.365(4) requires that the request include: 1) the name of the group; 2) the group's mailing address and phone number, if other than that of the institution; 3) the names of the group's officers; 4) the group's objectives and proposed activities; 5) the inmate population the group intends to include; 6) the group's charter, constitution or by-laws; 7) the institutional services and resources, such as staff time or meeting rooms, needed for the group's activities; and 8) the anticipated length and frequency of the group meetings or activities.

When making a decision whether to approve a new activity group, the warden must consider whether 1) the group's objectives promote educational, social, cultural, religious, recreational or other lawful leisure time interests of the inmates who will participate in the group; 2) the institution can accommodate the proposed activities with available resources; 3) the benefits of the group outweigh the group's demands on the institution's resources; and 4) the activities, services or benefits offered by the group are adequately provided by existing programs or groups. Wis. Admin. Code § DOC 309.365(b). Religious group requests may be made either under the rules governing requests for new religious practices, Wis. Admin.

Code § DOC 309.61, or inmate activity groups, Wis. Admin. Code § DOC 309.365.

It is undisputed that when plaintiff requested an atheist group under the new religious umbrella group procedure, Witch thought it was more appropriate for him to make his request under the "social group/organization" requirements. When plaintiff did this, McCaughtry denied the request on the ground that Waupun Correctional Institution was not forming any new activity groups at the time. Under § DOC 309.365 group requests must satisfy more criteria than requests for religious groups, such as having a group charter or by-laws. Moreover, even if the proposed group meets all the criteria set out in § DOC 309.365, the rule does not require the warden to grant the request. As I understand it, plaintiff is arguing that all inmate group requests should be treated the same, whether they are religiously motivated or not.

Defendants argue that they do not violate the establishment clause when they allow religious groups to congregate but deny a secular inmate group the same opportunity. Dft.'s Br., dkt. #87, at 7. Defendants seem to argue that the establishment clause permits them to treat religious inmate group requests differently from requests to form non-religious inmate groups. For support of this proposition, defendants cite Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 132 (1977), and Charles v. Verhagan, 220 F. Supp. 2d 955, 967 (W.D. Wis. 2002), aff'd, Charles v. Verhagan, 348 F.3d 601, 610-11 (7th Cir. 2003).

Defendants' reliance on Jones is misplaced. It is true that the realities of prison confinement curtail inmates' associational rights. Jones, 433 U.S. at 132. However, the pertinent issue in this case is whether a prison that permits some association can treat religious inmates' opportunities to associate differently from those of nonreligious inmates. The religion clauses are unique among the other clauses in the First Amendment. See, e.g., Sasnett v. Litscher, 197 F.3d 290, 292 (7th Cir. 1999) ("[T]o equate public religious observance to free speech would empty the free-exercise clause of a distinctive meaning."). As a result, it is appropriate to analyze this case under the establishment clause.

Recent cases addressing the constitutionality of the Religious Land Use and Institutionalized Persons Act serve as a useful model in analyzing the rules at issue in this case. The Act prohibits governments from imposing a substantial burden on the religious exercise of institutionalized persons, even if the burden results from a rule of general applicability, unless the burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest. See, e.g., Charles, 348 F.3d at 606. (The Act defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7); " Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 760 (7th Cir. 2003). This definition is broader than the definition provided under the First Amendment.) In Charles, 348 F.3d at 610, the court applied the Lemon test to the statute, concentrating on the second part of the test:

whether the statute had the primary effect of advancing or inhibiting religion. The court found that the statute did not have that effect because it did not exalt belief over nonbelief and therefore did not create rights for religious inmates that do not exist for non-religious inmates. Id. at 611. Two other circuits reached similar conclusions; one other circuit has found the statute unconstitutional. See Mayweathers v. Newland, 314 F.3d 1062, 1068 (9th Cir. 2002) (holding that Act does not violate establishment clause because it has secular legislative purpose, its primary effect neither advances nor inhibits religion and it does not foster excessive government entanglement with religion); Madison v. Riter, Case No. 03-6362, 2003 WL 22883620 at *8 (4th Cir. Dec. 8, 2003) (finding Act satisfies three prongs of Lemon test and concluding that opposite conclusion would work "profound change in Supreme Court's Establishment Clause jurisprudence and in the ability of Congress to facilitate free exercise of religion in this country."); Cutter v. Wilkinson, 349 F.3d 257, 267 (6th Cir. 2003) (holding that under Lemon test, Act violates establishment clause because it gives greater freedom to religious inmates and induces nonreligious inmates to adopt religion).

Like the Religious Land Use and Institutionalized Persons Act, the rule that permits new religious activities at Waupun Correctional Institution lifts a burden on religious groups by providing fewer criteria to meet when making new religious practice requests and providing defendants with less discretion in approving such requests. Charles, 348 F.3d at

610 (citing Mayweathers, 314, F.3d at 1069) ("RLUIPA does not violate the Establishment Clause just because it seeks to lift burdens on religious worship in institutions without affording corresponding protection to secular activities or non-religious prisoners."). To determine whether the rule for forming new religious practices at Waupun Correctional Institution violates the establishment clause, one must analyze the rule under the Lemon test. The court of appeals views the excessive entanglement prong of Lemon as an aspect of the second prong and plaintiff focuses on the first two prongs in his brief. Plt.'s Br., dkt. #79, at 36. Therefore, I will use the first two parts of the Lemon test to determine whether the criteria violate the establishment clause.

a. Legitimate secular purpose

According to Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987), it is a "permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." Furthermore, a "secular legislative purpose does not mean that the law's purpose must be unrelated to religion --- that would amount to a requirement that the government show a callous indifference to religious groups." Id.

The language used in the department's rule for establishing new religious practices is less restrictive than the language used in the rule for inmate activity groups. The limited

discretion and fewer criteria facilitate the group formation process and provide inmates with some certainty that the warden will approve their request if they meet the criteria. Like the Religious Land Use and Institutionalized Persons Act, the rule does not advance a particular religious viewpoint or even religion in general, but facilitates opportunities for inmates to engage in the free exercise of religion. Madison, No. 03-6362, 2003 WL 22883620 at *6 (viewing Act as secular because it is not designed to advance particular religious viewpoint or even religion in general, but rather to facilitate opportunities for inmates to engage in free exercise of religion); see also Mayweathers, 314 F.3d at 1068 ("RLUIPA intends a secular legislative purpose: to protect the exercise of religion in institutions from unwarranted and substantial infringement); but see Cutter, 349 F.3d at 263 (stating that unlike Title VII exemption for religious organizations that discriminate on basis of religion, described in Amos, enacting RLUIPA was not even arguably necessary to avoid violation of establishment clause).

Lifting burdens for religious groups is not uncommon. The Supreme Court has approved "statutes that allow public school students time off during the day solely for religious worship or instruction, Zorach v. Clauson, 343 U.S. 306, 315 (1952), property tax exemptions for religious properties used solely for religious worship, Walz v. Tax Commission, 397 U.S. 664, 680 (1970), and exemptions for religious organizations from statutory prohibitions against discrimination on the basis of religion, Amos, 483 U.S. at

335." Madison, No. 03-6362, 2003 WL 22883620 at **6-7; see also Mayweathers, 314 F.3d at 1068 (noting that Supreme Court has upheld statutes that alleviate significant governmental interference with ability of religious organizations to define and carry out their religious missions). The new religious practice rule lifts a burden for inmates wishing to create religious groups by requiring inmates to meet fewer criteria and requiring the warden to approve requests that meet the criteria. Therefore, it meets a legitimate secular purpose.

b. Advancement of religion

Although the new religious practice rule meets the first prong of the Lemon test, the rule must meet the second prong, which focuses on whether the *government itself* has advanced religion through its own activities and influence. Charles, 348 F.3d at 610 (noting ample room under establishment clause for benevolent neutrality that permits religious exercise to exist without sponsorship and without interference). Charles held that the Religious Land Use and Institutionalized Persons Act did not advance religion because the statute did not promote religious indoctrination or guarantee prisoners unfettered religious rights, but removed only the most substantial burdens states impose upon prisoners' religious rights. Id. at 611.

The rule for forming new religious practices does not promote religious indoctrination or guarantee prisoners unfettered religious rights. The record contains no evidence showing

that defendants apply the rule differently to different religious groups. The rule merely guides inmates who wish to form a religious group and provides some certainty that the warden will approve the request if it meets the rule's criteria. Plaintiff requests more discovery to show that defendants are willing to approve group meetings for very small inmate populations, such as Quakers, that "believe in a god," Plt.'s M. to Reconsider M. to Compel Discovery, dkt. #86, and to obtain information about the time defendants allocate to traditional religious groups in comparison to other groups and the number of complaints involving religion. However, such information would not show preferential treatment of certain religious groups in relation to plaintiff's atheist group request because the other groups meet the rule's requirement that more than one person be interested and participating in the group. It is undisputed that plaintiff was the only inmate at the Waupun Correctional Institution who expressed interest to Witch in forming and participating in an atheist group. Granting plaintiff's discovery request would not help his case.

Plaintiff contends that defendants violate the establishment clause because the rule for forming religious groups has the effect of allowing religious inmates access to more group activity than non-religious inmates. In Charles, 348 F.3d at 611, the defendants made a similar argument, asserting that the "accommodation of religious property" provision of the Religious Land Use and Institutionalized Persons Act increased the overall quantity of

personal property that inmates are entitled to possess.

Although it is true that the establishment clause forbids government endorsement or favoritism of religion over non-religion, see Allegheny County, 492 U.S. at 591 (citing Everson v. Board of Education of Ewing, 330 U.S. 1, 15-16 (1947) (establishment clause forbids government from passing laws that aid one or all religions or prefer one religion over another), it is equally true that "religious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster." Amos, 483 U.S. at 336 (noting that religious groups benefit from property tax exemption and schoolbook loans for parochial school students). The establishment clause does not require governments to provide a corresponding right to secular activities or non-religious prisoners. Charles, 348 F.3d at 610 (holding that because enactment of Act does not exalt belief over nonbelief, the statute does not create rights for religious inmates that do not exist for non-religious inmates); Amos, 483 U.S. at 337 ("A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose."); Madison, No. 03-6362, 2003 WL 22883620 at *8 ("To attempt to read a requirement of symmetry of protection for fundamental liberties would not only conflict with all binding precedent, but it would also place prison administrators and other public officials in the untenable position of calibrating burdens and remedies with the specter of judicial second-guessing at every turn."); but see Cutter, 349 F.3d at 266 (noting of RLUIPA that "[when Congress acts to lift the limitations

on one right while ignoring all others, it abandons neutrality towards these rights, placing its power behind one system of belief.").

In Charles, 348 F.3d at 611, the court held that the Religious Land Use and Institutionalized Persons Act did not prohibit the Wisconsin Department of Corrections from "requiring the removal of a non-religious item should an inmate wish to possess a religious item to which the statute entitles him." This "trade off" approach helps prison officials maintain order and security, as well as assure religious sincerity, minimize cost of accommodation and promote equal treatment between religious and non-religious inmates. Id. ("[W]e sincerely doubt that courts will increase exponentially the amount of religious property to which inmates are entitled by virtue of RLUIPA's protections (thereby mandating the State to allow prisoners to exceed any limit on personal property) in light of States' interests in maintaining order and security."); see also Stanley Ingber, Religion or Ideology: A Needed Clarification of the Religion Clauses, 41 Stan. L. Rev. 233, 292, n.357 (1989) (observing that when it is as burdensome to claim religious exemption as not to claim it, those with very minor conscientious scruples have no motive for fraudulent claims); Madison, No. 03-6362, 2003 WL 22883620 at *8 (noting that RLUIPA may create incentives for secular prisoners to cloak secular requests in religious garb, increasing burden on state officials, but that is not concern under establishment clause); Cutter, 349 F.3d at 266 ("One effect of RLUIPA is to induce prisoners to adopt or feign religious belief in order

to receive the statute's benefits."). Similarly, defendants may choose to equalize the rights between religious and non-religious inmates by, for example, offering activities available to non-religious inmates during the meeting times of religious groups. (I note that 309 IMP #6 prohibits inmates from receiving institution pay for participating in any religious activity that conflicts with their paid assignment.)

In any case, the rule that defendants use to help inmates establish new religious groups does not advance religion and therefore satisfies the second prong of Lemon. Because the rule satisfies both factors of the Lemon test, I find no establishment clause violation. Therefore, I will grant defendants' motion for summary judgment on plaintiff's First Amendment religion claim.

C. Plaintiff's Motion to Reconsider the Motion to Compel Discovery

In the November 21, 2003, order, United States Magistrate Judge Stephen L. Crocker denied plaintiff's motion to compel discovery because plaintiff failed to specify and detail the information he sought. Plaintiff has moved to reconsider that motion and in so doing has followed the magistrate judge's orders by specifying the information he seeks and why. As noted throughout this opinion, however, the information plaintiff seeks will not help his case. Plaintiff has failed to show that additional evidence would help him to defeat defendants' motion for summary judgment on plaintiff's various constitutional claims. Thus,

I will deny plaintiff's motion to reconsider the magistrate judge's denial of his motion to compel discovery as moot.

ORDER

IT IS ORDERED that

1. Defendants' motion for summary judgment is GRANTED on plaintiff James J. Kaufman's claim that defendants McCaughtry, McCarthy, Muenchow, Ray, O'Donnell, Hautamki and Ronzani violated his First Amendment rights when they opened eight pieces of mail outside his presence;

2. Defendants motion for summary judgment is GRANTED on plaintiff's claim that defendants McCaughtry and Witch violated his First Amendment rights under the free exercise and establishment clauses when they refused him permission to form an atheist group at Waupun Correctional Institution;

3. Plaintiff's motion to reconsider his motion to compel discovery is DENIED as moot;

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

Entered this 9th day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge