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

JONATHAN L. LIEBZEIT,

Plaintiff,

v.

MICHAEL THURMER and SAM APPAU,

Defendants.

ORDER

10-cv-170-slc

Plaintiff Jonathan Liebzeit is an adherent of Odinism, a religion that began in northern Europe more than 7,000 years ago and involves the worship of multiple gods and goddesses. (The parties alternatively refer to the religion as Asatru, but they agree that there are no relevant distinctions between the two, so for simplicity's sake, I will use the name Odinism.) Defendant Michael Thurmer is the warden of the Waupun Correctional Institution, where plaintiff was incarcerated during the time relevant to this lawsuit; defendant Sam Appau is the prison chaplain. In this lawsuit brought under 42 U.S.C. § 1983, plaintiff contends that defendants violated his rights under the free exercise clause of the First Amendment in two ways: (1) they refused to allow him to engage in group study or worship devoted exclusively to his own faith; and (2) they refused to allow him to possess various items associated with Odinism.

Defendants have moved for summary judgment on the grounds that plaintiff has failed to show that his religious exercise has been substantially burdened, that the limitations on plaintiff's religious exercise are reasonably related to legitimate penological interests in maintaining security and preserving resources and that they are entitled to qualified immunity. Alternatively, they argue that plaintiff is limited to nominal damages. Dkt. 94. (Because plaintiff is no longer housed at the Waupun prison, the court dismissed his claims for injunctive relief.)

I conclude that defendants are entitled to qualified immunity on all of plaintiff's claims with one exception: because defendants have offered no specific justification for denying plaintiff's request for wearing a religious head garment, I am denying their motion for summary judgment as to that claim.

Also before the court are dueling motions to "strike" affidavits submitted by both parties. *See* dkts. 113, 114 and 122. I am denying all of these motions because it was unnecessary to consider the disputed evidence in order to resolve defendants' motion for summary judgment.

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

UNDISPUTED FACTS

Plaintiff Jonathan Liebzeit is a prisoner at the New Lisbon Correctional Institution. During the events relevant to this lawsuit, plaintiff was housed at the Waupun Correctional Institution.

Plaintiff's Religious Beliefs

Plaintiff is an adherent of Odinism, which is also known as Asatru. Odinism, which is more than 7,000 years old, was the native religion and spiritual belief system of the Northern European people before their general conversion to Christianity. After a period of dormancy, practice of Odinism was revived in the early 1900s in Continental Europe and Scandinavia. Odinists believe in the Aesir and Vanir Gods and Goddesses of the Northern European people.

Plaintiff believes that Odinists should participate regularly in a religious ceremony called "the Blot," which is the "most important" religious service to him. It is "a ritual sacrifice made

to commune with and honor [the] Gods, Goddesses and/or divine beings." It includes nine parts: the hallowing, the reading, the rede, the call, the loading, the drinking, the blessing, the giving and the leaving. The service involves the use of a Thor's Hammer to hallow the area and the offering of mead, as well as various other religious items. The Blot should be followed by a Sumbel, "a ritualized celebration consisting of a three round toast." Plaintiff believes that a Blot and a Sumbel must be performed in a group.

Plaintiff believes that Odinists use runes to gain insight, wisdom and knowledge and to communicate with the gods and goddesses. He believes that a hlath (a type of headband) "serves to Hallow one's person and draw in Runic energies."

Plaintiff believes in the "Nine Noble Virtues" of courage, truth, honor, fidelity, discipline, hospitality, industriousness, self-reliance and perseverance.

Some white supremacist groups identify themselves as adherents of Odinism. However, plaintiff is not a member of a gang or any other group that participates in violent activities. He does not believe in the superiority of any racial or ethnic group over any other racial or ethnic group.

Policies Related to Prisoner Religious Exercise

DAI Policy and Procedure 309.61.01 establishes the concept of "umbrella religion groups," which are defined as "inclusive groups designed to appeal to a wide range of religious beliefs within a given faith group." These groups are "Protestant," "Catholic," "Jewish," "Islam," "Native American," "Eastern Religions" and "Pagan." At the Waupun prison, the Pagan group includes faiths such as Celtic, Druid, New Age, Northern Traditions, Wiccan, Asatru and

Odinist. Like Wicca, Odinism is an "earth religion," so the "needs and practices" of the adherents of the two religions "are somewhat similar."

DAI Policy 309.61.02 addresses the subject of religious property and includes a "Religious Property Chart." Although the chart sets forth the minimum religious items that prisoners may possess at any particular Wisconsin prison, prisoners at the Waupun prison may not possess any religious items that are not listed.

The chart says that members of each group may possess one of several pre-approved religious emblems. For the Pagan group, the chart lists these items: Oghan-rectangular, Triangle pendant, Triskele-3 circles connected, Pentagram and Thor's Hammer. Other items approved for individual use by members of the Pagan group are oil, the "Book of Shadows," a feather, a reflective surface and tarot cards. (The "Book of Shadows" is blank and is to be filled with writings by each individual prisoner.) For group use, the Pagan group may use a bell, a cauldron, a chalice, incense, a pentagram, salt and pentacle dish, wooden wand, baptistry, communion ware, communion bread and a "cross/crucifix."

Individual members of any umbrella group may possess a calendar, an emblem lanyard, "religious books/publications," and "religious art." For group use, all umbrella religion groups are allowed the following items: an electric or wax candle and holder, "audio/videotapes," "electronic equipment," "altar paraments," "available musical instruments," "table/altar," "lectern/podium," a stand for religious books and wine.

The Thor's Hammer emblem is the only item on the chart that is specifically for Odinists.[1] In the Religious Property Chart in effect until 2002, all of the items that now are

[1] Defendants dispute this fact, asserting that all of the Pagan items may be used by any member of the Pagan group. Dfts.' Resp. to Plt.'s PFOF ¶¶ 24-25, dkt. 124. However, defendants do not point to any other items on the list that have religious significance to Odinists.

classified as "Pagan" were classified as "Wiccan," with the exception of Thor's Hammer, which was not approved at the time.

Prisoners are not permitted to lead a religious service or study group because this creates a risk that the prisoner will use his leadership position to coerce other prisoners. If a religious leader is necessary, then the prison chaplain or an outside volunteer may fill the role.

Plaintiff's Opportunities for Religious Exercise

Christine Poortenga is the outside volunteer for the Pagan Umbrella Religion Group at the Waupun prison. She visits the prison once a week to lead one-hour religious services for the Pagan group. For several weeks in the fall of 2008, Poortenga led services related to the nine noble virtues and incorporated the Rite of Hammer into these services. (The parties do not explain in their proposed findings of fact or briefs what the Rite of Hammer is or how it relates to plaintiff's religious exercise.) Poortenga is not an adherent of Odinism or any of the Northern Traditions; she is Wiccan.

Between 2007 and 2010 the weekly Pagan group and an annual feast were the only religious services available to members of the Pagan group.

Prisoners are permitted to view or listen to religious videotapes and audiotapes in the chapel. Defendant Sam Appau, the prison chaplain, has attempted to obtain items related to Odinism, but the organizations he contacted do not donate their materials. All religious property in the prison chapel is donated.

Defendant Appau has attempted to find volunteers who could accommodate religious exercise for Odinist prisoners. In particular, he contacted organizations such as the Odinic Rite,

the Asatru Alliance and Northern Way Asatru Ministries, but none were willing or able to volunteer their time.

Mike Murray is the Director of World Tree Ministries, the prison outreach arm of the Asatru Alliance, and is responsible for assisting Odinist volunteers nationwide who are willing to lead religious services and study groups in prisons. If there were a sincere Odinist adherent in Wisconsin who was knowledgeable and willing to volunteer to lead religious services or study groups in a Wisconsin prison, it is likely that the person would contact Murray. However, Murray has not heard from any prospective volunteers in Wisconsin. To the best of Murray's knowledge, the nearest volunteers reside in Indiana and Missouri.

Plaintiff's Request for New Religious Practices and Items

If a prisoner wishes to participate in a religious practice or activity that is not offered at his prison and that involves other prisoners, affects his personal appearance or the operation of the prison, he must prepare and submit form DOC-2075, "Request for New Religious Practice." He must use the same form if he wishes to request permission to possess a religious item that is not included on the "Religious Property Chart." The request is reviewed first by defendant Appau and then by the program supervisor and the Religious Practices Advisory Committee and defendant Michael Thurmer (the warden), who makes the final decision. [2]

[2] Plaintiff disputes this proposed finding of fact on the ground that defendant Thurmer admitted in discovery that he does not have authority to modify the "Religious Property Chart" or to add a new "Religion Umbrella Group," but this is not contrary to defendants' proposed fact. Plaintiff cites no evidence that defendant Thurmer is prohibited from allowing religious practices or property beyond what is listed in department policy.

On November 5, 2008 plaintiff submitted a DOC-2075 form in which he asked for permission to create an "Asatru/Odinism Service-Study Group 1-2 Hours Per Week" and for permission to possess the following objects:

(1) a Thor's Hammer emblem, to be worn around the neck "on chain or cord";

(2) a "Rune Set with storage bag, Rune Lay Cloth, and Instruction Book":

(3) a book called *Poetic Edda*;

(4) a sacrificial bowl called a Bowli;

(5) mead;

(6) a Mead Horn;

(7) an evergreen twig;

(8) an altar or "properly adorned table";

(9) an altar cloth;

(10) Mjollnir, a large version of Thor's Hammer;

(11) an oath ring;

(12) a Gandr;

(13) "statues of gods and goddesses/religious art";

(14) candles,

(15) a Sun Wheel; and

(16) a hlath.

Plaintiff wished to keep the Thor's Hammer emblem, the runes, the *Poetic Edda*, the "religious art" and the hlath for personal use. The rest of the items he wanted to use for group worship only.

Defendant Appau recommended denial of all of plaintiff's requests. With respect to plaintiff's request for group study and worship, Appau concluded that the group services for the Pagan Umbrella Religion Group were sufficient. Appau did not directly address plaintiff's request for permission to possess specific religious items, but stated only that the requests were "not realistic in the restricted prison environment," at least until DOC approved "Asatru/Odinism" as a new Umbrella Religion Group. The program supervisor recommended denial on the ground that plaintiff "may pursue individual practice through study, meditation, approved books, literature and property items within his assigned living quarters. He may also receive pastoral visits consistent with institution procedures." The Religious Practices Advisory Committee recommended denial because "[t]he religious needs of this group are being met under the Pagan Umbrella Group" and because "[l]imits to the number of groups must be set to maintain order, and meet security and fiscal limitations." Defendant Thurmer denied the requests without comment.

Rune sets have symbols on them. Runes are not allowed at the prison unless they are written by the prisoner in the "Book of Shadows" or are printed in approved publications. Tarot cards are an approved religious property item. These cards may be altered by prisoners.

A Mjollnir is a large version of a Thor's Hammer. Although pictures of this item are permitted, the item is not permitted because of concerns that it could be used as a weapon.

Defendants are concerned that a Gandr could be used as a weapon. (The parties dispute what a Gandr is. Defendants say it is a "spear." Plaintiff says that it is "a wooden-like wand" that "symbolize[s] Odin's spear.")

Candles are not permitted for in cell use because they pose a fire hazard. Sun Wheels are not permitted because defendants believe they are a gang symbol.

A hlath is a type of headband. Muslim prisoners are permitted to wear kufi-caps for personal use and Jewish prisoners are permitted to wear yarmulkes.

Plaintiff possesses a copy of *Poetic Edda*.

Prisoners are permitted to possess plastic bowls, plastic cups, juice and towels, each of which may be purchased from the prison canteen. Prisoners have a foot locker in their cells.

OPINION

I. Standard of Review

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

discussing other elements). *See also Mayfield v. Texas Dept. of Criminal Justice*, 529 F.3d 599, 608 (5th Cir. 2008) (applying *Turner* to claims brought by Odinist prisoners without imposing other requirements).

Defendants concede that Odinism is a religion entitled to protection under the free exercise clause, *e.g.*, *Borzych v. Frank*, 439 F.3d 388, 390 (7th Cir. 2006), and they do not challenge the sincerity of plaintiff's religious beliefs for the purpose of their motion for summary judgment, so I need not consider the scope of that requirement. Both sides discuss the issues raised in questions (2), (3) and (4).

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

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

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

showing that government discriminated against religion, or a particular religion, by actually targeting a religious practice, rather than hit it by accident while aiming at something else.").

However, *Smith* and *Lukumi* do not foreclose the second interpretation. Although the Court did not say in either case that the plaintiff still must prove that his religious exercise was substantially burdened, it may have been unnecessary to answer that question because it was undisputed that a substantial burden had been imposed on the plaintiffs. In at least one case, the court of appeals included in its discussion of the free exercise clause the "substantial burden" test and the "neutrality" test. *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 631 (7th Cir. 2007). This case may suggest that plaintiffs must show both a substantial burden *and* religious discrimination to make out a claim under the free exercise clause. That is the view this court has taken in several cases. *E.g.*, *Jackson v. Raemisch*, 726 F. Supp. 2d 991, 998-1000 (W.D. Wis. 2010) (Conley, J.); *Borzych*, 2006 WL 3254497, at *4 (Crabb, J.).

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

In some cases, the court of appeals seems to suggest that a party may prove a free exercise violation with evidence of a substantial burden *or* a discriminatory rule. For example, in *Vision*

Church v. Village of Long Grove, 468 F.3d 975 (7th Cir. 2006), the court summarized the standard under the free exercise clause as follows:

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

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

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

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

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

Narrowing the exegesis to cases involving prisoners does not help because the standard is unclear within this subset. In one of its first cases about religion in prison, the Supreme Court seemed to adopt a test similar to *Smith* when it stated that prison officials violated the free exercise rights of a Buddhist prisoner "if he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts." *Cruz v. Beto*, 405 U.S. 319, 322 (1972). However, three years before *Smith*,

in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), the Court adopted the *Turner* test for prisoner claims brought under the free exercise clause. The Court did not discuss whether a prisoner must show as a threshold matter that his religious exercise was substantially burdened, although it noted that "[t]here is no question that respondents' sincerely held religious beliefs compelled attendance at Jumu'ah." *Id.* at 345. Since *O'Lone*, the Supreme Court has not decided another prisoner case under the free exercise clause.

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

One might argue that both the "neutrality" test and the "substantial burden" test are taken into account under *Turner.* The first *Turner* factor is whether there is "a valid, rational connection between the prison regulation and the legitimate and *neutral* governmental interest

put forward to justify it." *Shaw v. Murphy*, 532 U.S. 223, 229 (2001) (emphasis added) (internal quotations and brackets omitted). At least one court has treated the neutrality requirement under *Turner* as incorporating a principle similar to that in *Lukumi*. *Mayfield*, 529 F.3d at 609. Under the second *Turner* factor, the court must determine whether "alternative means of exercising the right . . . remain open to prison inmates," *Turner*, 482 U.S. at 90, which could be similar to a determination whether a restriction imposes a substantial burden on religious exercise. However, because *Turner* is a factor test (no one factor is necessarily dispositive) and the other tests involve elements, the issue is not necessarily resolved by applying *Turner* only.

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

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

II. Group Worship

A. Substantial burden

The court of appeals has defined a "substantial burden" on free exercise rights in different ways. In *Civil Liberties for Urban Believers*, 342 F.3d at 761, the court stated that a "substantial

burden" is "one that necessarily bears a direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." In *Koger*, 523 F.3d 789, the court quoted language from *Thomas v. Review Bd.*, 450 U.S. 707 (1981), that government conduct is substantially burdensome "when it puts substantial pressure on an adherent to modify his behavior and violate his beliefs," and language from *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996), that "a substantial burden on the free exercise of religion . . . is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs." In *Nelson*, 570 F.3d at 878, the court cited the definition from both *Civil Liberties for Urban Believers* and *Thomas*. Presumably, the court of appeals believes that a showing under any of these definitions is sufficient.

Both sides to some extent rely on testimony of third parties in their attempts to show that plaintiff's religious exercise was–or was not–substantially burdened by being unable to engage in group worship specific to Odinism. In their proposed findings of fact and in a separate motion, dkt. 122, the parties debate the admissibility of the affidavits of Laurel M. Owen and Valguard Murray, dkt. 1 and 118, two witnesses offered by plaintiff who discuss various aspects of Odinism. In particular, defendants argue that although Owen and Murray are testifying as experts, plaintiff did not follow the requirements of Fed. R. Civ. P. 26; therefore, this court should strike their testimony.

Plaintiff does not deny that testimony about the requirements of a particular religion falls within the meaning of expert testimony under F. R. Ev. 702, that he failed to disclose Owen and Murray as experts or that Owen and Murray failed to prepare reports that comply with Rule 26.

Further, plaintiff does not argue that his failure to comply with Rule 26 was harmless or substantially justified. *Meyers v. National R.R. Passenger Corp. (Amtrak)*, 619 F.3d 729, 734 (7th Cir. 2010) ("The consequence of non-compliance with Rule 26(a)(2)(B) is exclusion of an expert's testimony unless the failure was substantially justified or is harmless.") (internal quotations and alterations omitted). Instead, plaintiff says that he "is not relying on Owen or Murray as experts" and that he "views them as potential witnesses for trial to give live testimony about their own practice of Odinism." Dkt. #128, at 1. If this is plaintiff's true purpose in submitting the affidavits, then it was a pointless exercise because the religious exercises of a third party has no relevance to plaintiff's claim.

That said, it is questionable whether expert testimony is required or even appropriate when determining whether defendants have imposed a substantial burden on plaintiff's religious exercise, at least for the purpose of summary judgment. Defendants cite *Borzych*, 439 F.3d at 390, in which the court noted that the prisoner failed to cite any "objective evidence" to "suppor[t] his assertion that" the items he requested were "important" to his religion. The court concluded that a prisoner's "unreasoned say-so, plus equivalent declarations by other inmates" are "insufficient to create a material dispute that would require a trial" on the question whether the prisoner's religious exercise was substantially burdened.

Borzych is best read as a rejection of conclusory allegations in the context of a motion for summary judgment rather than a holding that expert testimony is required in a free exercise case. The latter reading would be contrary to other cases in which both the Supreme Court and the court of appeals have admonished parties for focusing on the question of what a particular religion "requires" or "mandates." For example, in *Thomas*, 450 U.S. at 715-16, the Court stated

that "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation." Similarly, in *Ortiz*, 561 F.3d at 669, the court stated that it could not dismiss a claim under the free exercise clause simply because a particular religious authority concluded that an item or practice was "not vital to worship," holding that a "person's religious beliefs are personal to that individual; they are not subject to restriction by the personal theological views of another." *See also Koger*, 523 F.3d at 803 ("[T]he prison officials employed a clergy-as-arbiter-of-orthodoxy standard that ha[s] long been rejected."); *Rust v. Clarke*, 883 F. Supp. 1293, 1306-07 (D. Neb. 1995) ("[T]his court is simply not suited to announce the 'correct' interpretation of Asatru religious literature or the 'proper' way to practice the Asatru religion.").

Under these cases, the question is not whether prison officials prevented the plaintiff from practicing a religion as defined by a particular religious expert, but whether they substantially burdened the prisoner's *personal* religious exercise. *Jackson v. Raemisch*, 726 F. Supp. 2d 991, 999 (W.D. Wis. 2010) ("The question is not whether a restriction places a substantial burden on an average adherent, but whether the plaintiff is substantially burdened in practicing his sincerely held beliefs."). Thus, the prisoner's own testimony on this point usually will be the most important piece of evidence in making this determination. *Koger*, 523 F.3d at 789, 799-800 ("[C]lergy opinion has generally been deemed insufficient to override a prisoner's sincerely held religious belief."). Expert testimony could be useful to bolster or to undermine a prisoner's testimony about the sincerity of his beliefs, but, as noted above, defendants are not challenging plaintiff's sincerity. In any event, a court cannot make credibility determinations on a motion

for summary judgment. *Darchak v. City of Chicago Bd. of Education*, 580 F.3d 622, 632-33 (7th Cir. 2009).

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

In some parts of his declaration and his proposed findings of fact, plaintiff makes the same mistake as defendants by framing the question as what is "mandatory" or "necessary and central to the practice of Odinism." *E.g.*, Plt.'s PFOF ¶¶ 55, 60, dkt. 117. Plaintiff does not argue that he qualifies as an expert, so I cannot consider his views on Odinism as a general matter. However, I will assume for the purpose of this opinion that, when plaintiff says that a particular religious practice is "mandatory" or "necessary," he is referring to his personal beliefs. Further, plaintiff is more precise in other parts of his declaration. For example, he discusses his own belief that group worship in the form of a Blot and a Sumbel is an important way for him to honor the gods and his ancestors. Plt.'s Decl. ¶¶ 29, 31 and 43, dkt.119. Other courts have concluded that

Odinists' religious exercise may be substantially burdened by being unable to engage in group worship devoted to their own beliefs. *E.g.*, *Gordon v. Caruso*, 2009 WL 6040729, *7 (W.D. Mich. 2009).

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

Unfortunately, neither side discusses in detail the content of the Pagan group meetings. However, it appears to be undisputed that the group did not perform Blot or Sumbel while plaintiff was at the Waupun prison. Defendants say that the Pagan group volunteer focused on Odinism at several meetings in 2008, but they do not suggest that issues specific to Odinism were included on a regular basis during the relevant time period or that the volunteer ever led a Blot or Sumbel service. Because the ability to conduct Blot and Sumbel is the primary reason that plaintiff identified for wanting a separate Odinist group, I cannot say as a matter of law that plaintiff has failed to show that defendants substantially burdened his religious exercise. Further, I cannot say as a matter of law that it would have been sufficient for plaintiff to conduct a Blot or Sumbel by himself in his cell.

B. Neutrality

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

In any event, because plaintiff is alleging that he is unable to participate in a group service that has any religious significance to him, it would be unlikely that defendants could prevail on this ground unless defendants did not allow *any* group to engage in meaningful group worship. Although the parties do not say whether other sects in the Pagan group are similarly dissatisfied, DOC's own policy discusses opportunities for "Catholic Mass, Sweat Lodge Ceremony and Protestant Worship Services," dkt. 93-1, at 5, suggesting at least that prisoners outside the Pagan group have better opportunities for group worship.

C. Relationship to a Legitimate Penological Interest

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

Defendants identify several reasons why they did not allow plaintiff and other Odinists to engage in group worship, but I only need to consider this one: no qualified nonprisoner volunteers were available to lead the service. Although defendants did not identify this reason when they rejected plaintiff's request for group worship, that is irrelevant under *Turner*. Because *Turner* is an objective test, it does not matter whether the reasons advanced during litigation match the reasons officials gave the prisoner at an earlier time. *Hammer v. Ashcroft*, 570 F.3d 798, 803 (7th Cir. 2009). The only question is whether the asserted interested is reasonably related to the restriction.

In addressing the reasonableness of this justification, I will first set to one side the issues that plaintiff is *not* raising. First, plaintiff does not challenge defendants' view that it is legitimate to prohibit prisoners from leading group worship because it could give particular prisoners too much authority in the eyes of other prisoners and could lead to predatory relationships. This is a wise concession. The court of appeals established long ago that prison officials are justified in requiring an approved nonprisoner to lead prisoners in group worship. *Johnson-Bey v. Lane*, 863 F.2d 1308, 1310-11 (7th Cir. 1988) (prison officials "need not . . . allow inmates to conduct their own religious services, a practice that might not only foment conspiracies but also create (though

more likely merely recognize) a leadership hierarchy among the prisoners"); *Hadi v. Horn*, 830 F.2d 779, 784-85 (7th Cir. 1987) (rejecting claim that Muslim prisoners were entitled to lead their own services when chaplain or volunteer was not available). *See also Adkins v. Kaspar*, 393 F.3d 559, 565 (5th Cir. 2004) (upholding prison requirement that volunteer must supervise religious services); *Tisdale v. Dobbs*, 807 F.2d 734, 738-39 (8th Cir. 1986) (same).

Second, plaintiff does not argue or adduce any evidence that defendants have applied the policy in a discriminatory fashion by allowing other religious groups to meet without a qualified supervisor. *Compare Mayfield*, 529 F.3d at 608-09 (plaintiff raised genuine issue of material fact regarding reasonableness of prohibition against prisoner-led religious groups when plaintiff submitted evidence that other religious groups at the same prison were allowed to do so); *Johnson-Bey*, 863 F.2d at 1312 (remanding case on issue of reasonableness when there was "evidence that the ban against inmate-conducted services is enforced arbitrarily").

Third, plaintiff does not argue that defendants were required to hire a Odinist chaplain or that they were required to try harder to find an appropriate volunteer. Rather, it is undisputed that defendant Appau attempted to find Odinist volunteers to come to the prison, but no one agreed to do so. Plaintiff himself does not point to any potential volunteers that defendants should have asked.

Fourth and finally, plaintiff does not argue that defendants should have asked the Pagan group volunteer to lead the Blot or that defendant Appau himself should have done so. It appears to be undisputed that neither was qualified to lead the service. Because plaintiff does not raise the issue, I do not consider whether defendant Appau could be required under the free exercise clause to educate himself about Odinism so that he could lead the service himself.

Despite his concessions, plaintiff argues that it was unreasonable for defendants to prohibit group worship by Odinists because Odinist prisoners do not *need* a leader. In particular, plaintiff argues that there are two ways that defendants could have accommodated his religious worship: (1) use a "preapproved script" during Blot and Sumbel with supervision by defendant Appau; or (2) use "electronic medium," such as videotapes, CDs or teleconferencing.

With respect to plaintiff's first suggested alternative, even if I assume that plaintiff is correct that Blot and Sumbel do not "need" a leader, he has not shown that using a "preapproved script" would have addressed defendants' concerns *or* accommodated his religious exercise. First, if Odinist prisoners were to use a "preapproved script," who would prepare it and who would "preapprove" it? Plaintiff does not identify any nonprisoner who would have been willing or able to do this. To the extent plaintiff believes that he or another Odinist prisoner could have written and chosen the script, this resurrects the DOC's concern about elevating prisoners to positions of religious leadership. The court of appeals rejected an argument similar to plaintiff's in *Hadi*, 830 F.2d at 786-87, in which the question was whether Muslim prisoners had a right to perform Jumah services without a nonprisoner to lead them:

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

The same is true in this case. Without a qualified outside volunteer, a prisoner will have to determine the content of the service. Plaintiff simply ignores this problem. *Compare Hummel v. Donahue*, 2008 WL 2518268, *5-6 (S.D. Ind. 2008) (in case decided under RLUIPA, concluding that "preapproved script" was possible alternative to prisoner-led services when there was evidence that other religious groups were allowed to do this and plaintiffs identified nonprisoner volunteer who was willing to prepare script).

Further, plaintiff's own declaration suggests that the Blot ceremony is much more involved than a simple reading of a prayer. Plaintiff identifies eight other aspects of the Blot beyond the reading. Plt.'s Decl. ¶ 25, dkt. 119. Who is to determine whether and how these other rituals are to be performed? Plaintiff doesn't say.

Plaintiff's second alternative is a nonstarter because he does not allege that he ever asked any of the defendants for permission to obtain any "electronic medium" related to Odinism or that, if he did, defendants denied his request. In fact, it is undisputed that defendant Appau looked for materials that could act as a substitute for a volunteer, but he was unable to find any organizations willing to donate them. Even now, plaintiff does not identify any specific audio or visual materials that he believes he should have been allowed to possess.

One issue that gives me pause is that plaintiff had no alternatives for engaging in Odinist group worship. *Beard v. Banks*, 548 U.S. 521, 532 (2006) ("The absence of any alternative thus provides some evidence that the regulations are unreasonable, but is not conclusive of the reasonableness of the Policy.") (internal quotations and brackets omitted). Prisoner-led services undermine security but no qualified nonprisoners were available. One Seventh Circuit opinion suggests that prison officials may have a heightened burden to justify a decision to deny prisoners

the ability to lead worship services when no other alternatives may be found. In *Johnson-Bey*,863 F.2d at 1311-12, the court stated that "the reasonableness of the ban on inmates' conducting their own religious services is related to the availability of substitutes, whether chaplains employed by the prison or ministers invited on a visiting basis." Other language in the same case suggests that prison officials may have an obligation to find *someone* to lead the service if they do the same for other religious groups. *Id.* at 1312-13 ("The potential financial burden on small sects of providing visiting ministers to prison-the prison authorities deem them 'volunteers' and will not compensate them even to the extent of reimbursing them for their expenses, while picking up the full tab for full-time chaplains for Catholic and Protestant prisoners-is troubling.").

As noted above, plaintiff does not develop an argument that prisoners should have been allowed to lead group services or that defendants should have done more to find a qualified nonprisoner leader. Further, although it is undisputed that defendant Appau did lead the worship services for one Protestant group of prisoners, Plt.'s PFOF ¶ 80, dkt. 117; Dfts.' Resp. to Plt.'s PFOF ¶ 80, dkt. 124, neither side proposed any facts regarding the surrounding circumstances. Further, because plaintiff has never suggested that he even *wanted* Appau to lead Blot or Sumbel, the relevance of the language in *Johnson-Bey* to our facts is questionable.[3]

D. Qualified Immunity

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

Even if *Johnson-Bey* provides some support to plaintiff's claim, it would not be enough to overcome defendants' qualified immunity defense, which requires plaintiff to show that "clearly established" law required defendants to permit plaintiff to hold group worship services for Odinists without a nonprisoner leader. *Narducci v. Moore*, 572 F.3d 313, 318 (7th Cir. 2009) ("The doctrine of qualified immunity protects government officials from lawsuits for damages when their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

The primary question in *Johnson-Bey* was whether prison officials were applying the "no prisoner leaders" rule arbitrarily, an issue that plaintiff does not raise. The court did not identify any other circumstances under which it would be unreasonable to apply the rule despite the absence of alternatives for group worship. Therefore, even if I were to conclude that defendants had an obligation to accommodate plaintiff's wish to engage in group worship, this would be an extension of the existing law that expanded the holding of *Johnson-Bey* to cover the facts presented in this case. In other words, there is no clearly established law on the issue raised by plaintiff's complaint that defendants could have violated. Perforce, defendants have qualified immunity and they are entitled to summary judgment on plaintiff's claim related to group worship.

III. Group Study

In addition to group worship, plaintiff asked defendants for the opportunity to engage in "group study." However, plaintiff does not explain what religious significance group study would have for him. In fact, he does not develop any evidence or argument regarding the reason he wanted to engage in group study or the extent to which such a request could be

accommodated without threatening defendants' legitimate penological interests. Accordingly, to the extent plaintiff intended to include a claim for Odinist group study, he has forfeited that claim.

IV. Religious Items

The following religious items that plaintiff requested are at issue in this case: (1) a Thor's Hammer emblem, to be worn around the neck "on chain or cord"; (2) a "Rune Set with storage bag, Rune Lay Cloth, and Instruction Book"; (3) a book called *Poetic Edda*; (4)a sacrificial bowl called a Bowli; (5) mead; (6) a mead horn; (7) an evergreen twig; (8) an altar or "properly adorned table"; (9) an altar cloth; (10) Mjollnir; (11) an oath ring; (12) a Gandr; (13) "statues of gods and goddesses/religious art"; (14) candles; (15) a sun wheel; and (16) a hlath.

Many of these items do not require extended discussion. For example, the Bowli, mead, mead horn, evergreen twig, altar, altar cloth, Mjollnir, oath ring, Gandr, statues, candles and sun wheel are all items that plaintiff requested as part of group worship only. Because I have concluded that defendants did not violate plaintiff's clearly established rights under the free exercise clause by failing to accommodate his requests to engage in group worship, it follows that the defendants did not violate plaintiff's clearly established rights by failing to grant him permission to possess items which had no identified religious purpose outside of group worship. *Mayfield*, 529 F.3d at 608 ("The absence of the Blotar items in the chapel does not impose a distinct burden on Mayfield's religious practice unless the Odinists can meet without a volunteer.").

With respect to the *Poetic Edda* and "religious art," it is undisputed that DOC policy allowed plaintiff to have these items. All plaintiff needed to do was order them. In fact, plaintiff concedes that he *has* a copy of the *Poetic Edda*, so plaintiff cannot show a violation his rights.

With respect to the Thor's Hammer emblem, it is undisputed that plaintiff was allowed to keep such an emblem for personal use. His complaint is that he had to keep it on a lanyard rather than a chain or a cord and he points out that Native American prisoners were allowed to keep their medicine bags on a cord.

Plaintiff's problem is that he fails to explain why he believes there is *any* religious difference between a lanyard and a chain or a cord. *Cf. Rapier v. Harris*, 172 F.3d 999, 1006 (7th Cir. 1999) ("De minimis burdens on the free exercise of religion are not of constitutional dimension."); *Smith v. Allen*, 502 F.3d 1255, 1277-78 (11th Cir. 2007)(dismissing claim that Odinist was entitled to a crystal because he "failed to establish the relevance of the crystal to his practice of Odinism"). In his declaration, he says only that he believes "it is necessary and important to the practice and exercise of my religion that I be allowed to wear my Thor's Hammer on a chain or cord," Plt.'s Decl. ¶ 80, dkt. 119, but he does not elaborate. This conclusory assertion is not sufficient to defeat defendants' motion for summary judgment. *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 354 (7th Cir. 2002) ("It is well-settled that conclusory allegations . . . do not create a triable issue of fact."); *Borzych*, 439 F.3d at 390.

Even if the free exercise clause does not require a plaintiff to show that his religious exercise was substantially burdened, he must show at the very least that the activity being restricted is "religious." *Thomas*, 450 U.S. at 713 ("Only beliefs rooted in religion are protected by the Free Exercise Clause."). Without some specific explanation regarding the religious

significance to plaintiff of a chain or cord, I cannot conclude that the restriction implicates plaintiff's free exercise rights.

This leaves plaintiff's request for runes and a hlath. In his declaration, plaintiff avers that he believes that he needs runes "to gain insight, wisdom and knowledge" and to help him "communicat[e] with the gods and goddesses." Plt.'s Decl. ¶¶ 33-39, dkt. #119. He believes that they are important not just for group worship but for "personal possession and daily use" as well. *Mayfield*, 529 F.3d at 615 (Odinism "advocates regular, personal study of the runestones").

As for the hlath, plaintiff states that it "serves to Hallow one's person and draw in Runic energies." *Id.* at ¶¶ 77, 103. These averments are sufficient to show for the purpose of defendant's motion for summary judgement that plaintiff's religious exercise was substantially burdened without these items. *Mayfield*, 529 F.3d at 616 ("[A] reasonable trier of fact [could] conclude that the TDCJ's runestones policy substantially burdens his religious exercise.").

Defendants justify the prohibition on runes primarily on the ground that prisoners could use them to communicate in code because symbols are engraved on them. In addition, defendants state that they believe that rune symbols have been used by Neo-Nazi groups and white supremacists. *Griffin v. Commonwealth of Virginia*, 2008 WL 2944553, *4 (W.D. Va. 2008) (discussing relationship between rune symbols and Neo-Nazis). This court accepted these arguments in *Borzych v. Frank*, 2010 WL 1026977, *4 (W.D. Wis. 2010), concluding that a ban on rune stones and rune cards was reasonably related to these legitimate penological interests. *See also Mayfield*, 529 F.3d at 611 (upholding ban on runes).

Plaintiff raises several potential problems with the defendants' arguments that do not appear to have been raised in *Borzych*. First, he says that prisoners at the Waupun prison are allowed to write their own rune symbols on paper, which plaintiff says would likely be a much easier way to communicate a code than a set of stones. Second, prisoners are allowed to possess tarot cards, which also include symbols. These are valid points, but they do not necessarily show that defendants' actions are unreasonable. Simply because prison officials do not prohibit prisoners from writing in their own journals does not mean that officials must take the additional step of encouraging the use of runes in a more tangible form. *Krispin v. Thurmer*, 2010 WL 2262613, *4 (W.D. Wis. 2010) ("[B]ecause prison restrictions are not subject to strict scrutiny, they are not invalid simply because they prohibit less conduct than might be justified by the prison officials' legitimate interest.").

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

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

Finally, with respect to plaintiff's request for a hlath, defendants say . . . absolutely nothing. They do not identify any security concerns raised by plaintiff possessing a hlath and they do not explain why they allow Jews to wear yarmulkes and Muslims to wear kufis, but they did not allow plaintiff to wear his own religious head garment. In fact, defendants do not even mention plaintiff's request for a hlath in either of their briefs except to note in their statement of facts that plaintiff made the request. Dkt. 110, at 3.

Defendants make a general argument that they have an interest in limiting the amount and "variety" of items that a prisoner may possess, but this does not mean that prison officials can deny requests arbitrarily. As plaintiff points out, DOC has property limits in place to address the concerns defendants identify, Wis. Admin. Code § DOC 309.20(3)(c), and defendants do not suggest that allowing plaintiff to possess a hlath would have pushed him over his limit. Even if it would have, plaintiff could have been given the choice between a hlath and another item.

Any argument about limiting the "variety" of items falls flat because defendants allowed prisoners of other faiths to wear head garments. This case is similar to *Sasnett*, 197 F.3d at 292, in which the court held that prison officials violated the free exercise clause by permitting Catholic prisoners to keep a rosary but prohibiting Protestant prisoners from keeping a cross. The free exercise clause does not allow prison officials "to pick and choose between religions without any justification." *Id. See also Shepard v. Peryam*, 657 F. Supp. 2d 1331, 1350-51 (S.D. Fla. 2009) (discriminatory headwear policy for Muslims and Jews may violate Constitution). In light of the similarity between this case and *Sasnett*, I conclude that defendants are not entitled to qualified immunity on this claim. However, because plaintiff did not file his own motion for summary judgment, this claim must proceed to trial.

V. Damages

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

"Punitive damages are recoverable in § 1983 actions where the defendant had a reckless or callous disregard to the federally protected rights of others." *Woodward v. Correctional Medical Services of Illinois, Inc.*, 368 F.3d 917, 930 (7th Cir. 2004). In this case, defendants have offered no specific justification for their decision to deny plaintiff's request. The record is silent. As a result I cannot find that a reasonable jury could not find on this record that defendants acted with reckless disregard of plaintiff's rights under the free exercise clause. Accordingly, I decline to conclude as a matter of law that plaintiff may not seek punitive damages.

ORDER

It is ORDERED that

(1) The motion for summary judgment filed defendants Sam Appau and Michael Thurmer, dkt. 94, is DENIED with respect to plaintiff Jonathan Liebzeit's claim that defendants violated his rights under the free exercise clause by refusing to give him permission to wear a hlath.

(2) Defendants' motion for summary judgment is GRANTED with respect to plaintiff's claim that defendants violated his rights under the free exercise clause by refusing to allow him to engage in group worship or study and refusing to give him to permission to obtain the following items: a Thor's Hammer emblem, to be worn around the neck "on chain or cord," a "Rune

Set with storage bag, Rune Lay Cloth, and Instruction Book, a book called *Poetic Edda*, a sacrificial bowl called a Bowli, mead, a mead horn, an evergreen twig, an altar or "properly adorned table," an altar cloth, Mjollnir, an oath ring, a Gandr, “statues of gods and goddesses/religious art,” candles and a sun wheel.

(3) Plaintiff’s motion to strike portions of Daniel Westfield’s expert report, dkt. 113, plaintiff’s motion to strike portions of Marc Clements’ affidavit, dkt. 114, and defendants’ motion to strike the affidavits of Laurel Owen and Valgard Murray, dkt. 122, are DENIED as unnecessary.

(4) The case will proceed to trial on plaintiff’s claim that defendants violated his rights under the free exercise clause by refusing to permit him to wear a hlath.

Entered this 13th day of June, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge