

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

DEREK S. KRAMER,

Plaintiff,

v.

WISCONSIN DEPARTMENT OF CORRECTIONS,
WILLIAM POLLARD, DENNIS MOSHER
and PETER HUIBREGTSE,

Defendants.

ORDER

10-cv-224-slc

Plaintiff has filed a motion for reconsideration of portions of this court's summary judgment order. *See* dkt. 84 and 87. He argues that the court erred in the following respects:

- (1) dismissing his claim that defendants violated his rights under the free exercise clause by refusing to allow him to possess or wear a hlath;
- (2) refusing to consider the affidavits of Valgard Murray and Laurel Owen-Scutair;
- (3) dismissing his claims that defendants are violating his right to equal protection by refusing to allow him to engage in group worship;
- (4) declining to enter judgment in plaintiff's favor sua sponte on his claim that defendants are violating his rights under the free exercise clause, the equal protection clause and the Religious Land Use and Institutionalized Persons Act by refusing to allow him to possess a Thor's Hammer emblem in segregation.

I am granting the motion with respect to plaintiff's first argument, but denying it as to the others.

With respect to the hlath, I dismissed plaintiff's claim under the free exercise clause because he failed to explain in his affidavit how he used the hlath to practice his religion. However, plaintiff points out that defendants did not challenge his claim on this ground. In fact, they did not challenge this claim on *any* ground—they ignored it in their briefs and proposed

findings of fact. Generally, "[t]he party opposing summary judgment has no obligation to address grounds not raised in a motion for summary judgment." *Pourghoraishi v. Flying J, Inc.*, 449 F.3d 751, 765 (7th Cir. 2006). If defendants had raised this issue in their motion for summary judgment, plaintiff would have been on notice that he needed to come forward with evidence to support this element of his claim. Accordingly, I will give plaintiff an opportunity in the next round of summary judgment to provide supplemental evidence to address the religious significant a hlath has for him. However, plaintiff does not challenge my decision that Michael Donovan cannot be held liable for refusing to allow plaintiff to possess or wear a hlath because he recommended granting plaintiff's request, so I am not reinstating plaintiff's claim against Donovan.

I am denying plaintiff's motion related to Murray and Owen-Scutair as unnecessary. In the summary judgment opinion, I concluded that "I need not dwell on the admissibility of the affidavits because I am not persuaded that expert testimony is required or even appropriate when determining whether defendants have imposed a substantial burden on plaintiff's religious exercise, at least for the purpose of summary judgment." Dkt. 84, at 19. Because I concluded that the affidavits were not necessary for plaintiff to prove his claim, it is unclear why he is seeking reconsideration of this issue. In his motion, he fails to identify prejudice he suffered by the court's failure to consider the affidavits.

It is not easy to follow plaintiff's argument regarding his claim that defendants are violating his right to equal protection by denying his request for group worship. As far as I can tell, plaintiff believes that defendants did not adequately justify their position because the affidavits that defendants filed came from DOC officials rather than officials at the particular

prison at issue. However, the relevant question on plaintiff's claim is whether a rational basis exists to support their actions; it does not matter which official provides the explanation. Plaintiff does not cite any authority to the contrary.

Further, as I explained to plaintiff in the summary judgment order, he cannot prevail on his equal protection claim simply by showing that different wardens at other prisons came to different conclusions about which group practices to allow. *Ellis v. United Parcel Service, Inc.*, 523 F.3d 823, 826-27 (7th Cir. 2008)(court cannot infer discriminatory intent when different decision makers are involved). Plaintiff was required to show that *defendants* were treating other similarly situated prisoners more favorably than they treated him, but he has not made that showing.

With respect to plaintiff's request for the court to enter judgment in his favor, I explained to him in the summary judgment opinion that granting summary judgment *sua sponte* is disfavored. *Golden Years Homestead, Inc. v. Buckland*, 557 F.3d 457, 461 -462 (7th Cir. 2009) ("[G]ranted summary judgment sua sponte warrants special caution and generally requires that the party against whom summary judgment is entered have notice and an opportunity to present its evidence."). *See also Walker v. Sheahan*, 526 F.3d 973, 980 (7th Cir. 2008); *Dawson v. Newman*, 419 F.3d 656, 660 (7th Cir. 2005). If plaintiff believed he was entitled to summary judgment, he could have filed his own motion, but he did not. In any event, I am giving plaintiff an opportunity now to seek summary judgment with respect to any of the remaining claims, so he cannot claim that he is unfairly prejudiced.

Finally, plaintiff asks for permission to rely on previously filed documents to support his position on the second round of summary judgment, which begins briefing on August 31. Both

sides are free to cite any evidence that is already in the record to support their positions on summary judgment. However, to avoid misunderstandings, I note that a piece of evidence is not automatically admissible just because somebody put it in the record. Each party is free to raise evidentiary objections to any documents cited by the other side.

ORDER

IT IS ORDERED that:

- (1) Plaintiff Derek Kramer's motion for reconsideration, dkt. 87, is GRANTED as to his claim that defendants William Pollard and Dennis Mosher violated his rights under the free exercise clause by refusing his request for a hlath. The parties may include this claim in their upcoming summary judgment submissions; and,
- (2) Plaintiff's motion is DENIED in all other respects.

Entered this 8th day of August, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge