IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YASSIN MUHIDDIN AREF, *et al.*	)	
Plaintiffs,	)	
v.	)	Civil Action No. 10-0539 (RMU)
ERIC HOLDER, *et al.*	)	
Defendants.	)	

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT ON DANIEL McGOWAN'S RETALIATION CLAIM

In August 2008, McGowan was placed in a Communications Management Unit ("CMU"). Shortly thereafter, McGowan availed himself of the Bureau of Prisons' ("BOP") administrative grievance process by filing multiple inmate grievances, two of which are at issue in this motion. In the first, McGowan alleged that his placement in the CMU "violates my constitutional rights"; specifically, that "[t]he CMU was established in violation of Federal regulations and thus, subjects me to due process violations." Plumley Decl. Ex. B, ECF No. 47-2. In the second, McGowan claimed that there were "errors in my 'Notice to Inmate of Transfer to CMU.'" Plumley Decl. Ex. C, ECF No. 47-2. These grievances did not put BOP on notice that McGowan was alleging, as he does in his Complaint, that his transfer to a CMU in 2008 was "in retaliation for [his] continued lawful communication and speech." Compl. ¶ 167, ECF No. 5. As a result, the Prison Litigation Reform Act ("PLRA") requires that this claim be dismissed.

ARGUMENT

The PLRA mandates that inmates exhaust all available administrative remedies prior to bringing suit in federal court. 42 U.S.C. § 1997e(a); *Porter v. Nussle*, 534 U.S. 516, 524 (2002). Although the D.C. Circuit has yet to address the level of detail an inmate must include in an administrative grievance, other courts of appeals have held that "a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought." *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002). Inmates need not articulate a particular legal theory but instead must at least "alert prison officials to a problem and give them an opportunity to address it." *Johnson v. Johnson*, 385 F.3d 503, 518 (5th Cir. 2004). Grievances that are "so vague as to preclude prison officials from taking appropriate measures to resolve the complaint internally" do not satisfy the exhaustion requirement. *Brownell v. Krom*, 446 F.3d 305, 310 (2d Cir. 2006).

Relying on unpublished decisions from the Ninth Circuit and district courts in California, McGowan suggests that an inmate need only "complain[] about a prison official's actions or a hardship, without specifically alleging that these actions or hardship were retaliatory in nature." Pl.'s Mem. in Opp. to Defs.' Mot. for Summ. J. on Daniel McGowan's Retaliation Claim ("McGowan Opp.") at 7, ECF No. 50.[1] A significant number of circuit courts, however, have reached the opposite conclusion, even under the generous *Strong* standard. The Second Circuit,

[1] The three circuit court opinions cited by Plaintiff are all unsigned per curiam decisions that engage in only a cursory analysis of the exhaustion issue. *See Wilson v. Mata*, 348 F. App'x 237 (9th Cir. 2009); *Tenille v. Quintana*, No. 11-2682, 2011 WL 3841123 (3d Cir. Aug. 31, 2011); *Norwood v. Robinson*, No. 10-16188, 2011 WL 2213832 (9th Cir. June 8, 2011). Regarding the two district court opinions Plaintiff cites, in *El-Shaddai v. Wheeler*, No. CIV S-06-1898 FCD EFB P, 2008 WL 410711 (E.D. Cal. Feb. 12, 2008), the inmate's grievance, unlike those filed by McGowan, contained a detailed description of the allegedly retaliatory action, including the protected conduct in which the inmate had engaged prior to the retaliation taking place, *id*. at *1. And in *Gray v. Salao*, No. C 10–03474 WHA, 2011 WL 4024693 (N.D. Calif. Sept. 9, 2011), the court was sympathetic to the fact that "the [grievance] form and its instructions were mainly in a language unknown to plaintiff," *id.* at *5, a fact not present in the instant case.

for instance, held that an inmate's retaliation claim was unexhausted where "[t]he grievance requested an investigation into [] lost property but did not allege that corrections personnel had intentionally interfered with the transfer of that property." *Brownell*, 446 F.3d at 308-09. The court concluded, with "little difficulty," that because the grievance failed to include "allegations of misconduct by corrections officers," it did not "trigger the level of investigation that a grievance suggesting retaliation would trigger." *Id*. at 311.

Other circuit courts have reached similar conclusions when assessing whether an inmate properly exhausted a retaliation claim. *See, e.g.*, *Emmett v. Ebner*, 423 F. App'x 492, 493 (5th Cir. 2011) (dismissing retaliation claim where inmate's grievance "contested only whether his disciplinary charge was correctly decided on the merits and whether he was given sufficient notice of his disciplinary proceedings" and did not contain "any mention that his disciplinary case was the product of retaliation"); *Boyd v. United States*, 396 F. App'x 793, 796 (3d Cir. 2010) (dismissing claim for retaliatory conduct where grievance "made no mention of retaliation"); *Garrison v. Walters*, 18 F. App'x 329, 331 (6th Cir. 2001) ("Although Garrison filed a grievance concerning the destruction of his photo album, he did not state any facts that would have indicated that he was grieving [a prison official's] alleged retaliatory conduct.") And one district court has held, on facts similar to those here, that allegations concerning the accuracy of information in an inmate's file did "not provide notice that the grievances involved retaliation." *See Gonzalez v. Doe*, No. 07-CV-1962 W(POR), 2010 WL 3718873, *5 (S.D. Cal. Sept. 20, 2010).

Neither of the grievances highlighted by McGowan in his opposition brief sufficiently "alert[ed] the prison to the nature of the wrong for which redress is sought," *see Strong*, 297 F.3d at 650, namely that McGowan was allegedly designated to the CMU "in retaliation for [his]

continued lawful communication and speech," Compl. ¶ 167. In Administrative Remedy No. 508242, he merely asserted that his placement in the CMU "violates my constitutional rights."[2] Plumley Decl. Ex. B. Administrative Remedy No. 509775 similarly lacks any mention of retaliatory conduct by BOP officials and instead seeks evidentiary support and correction of alleged errors in McGowan's Notice of Transfer to the CMU. *See id*. Ex. C. As such, neither of the two grievances "trigger[ed] the level of investigation that a grievance suggesting retaliation would trigger." *Brownell*, 446 F.3d at 311. And because it had no notice of any retaliation claim brought by McGowan, BOP responded appropriately to the grievances by verifying that McGowan was designated to the CMU based on the criminal behavior noted in his presentence investigation report (PSR) (No. 508242), which included multiple acts of arson while a member of a domestic terrorist organization, and that the information contained in his Notice of Transfer accurately reflected the PSR (No. 509775).[3]

McGowan's failure to include a retaliation claim in a grievance is especially noteworthy given that he was a frequent and sophisticated user of BOP's administrative grievance process, even without the assistance of his present counsel. In the four years that he has been in BOP custody, McGowan has filed nineteen separate administrative remedy requests using a BP-9

[2] Importantly, McGowan elaborated on the alleged violations of his constitutional rights in the next sentence of his grievance by asserting that the CMU "subjects me to *due process violations*." Plumley Decl. Ex. B (emphasis added). Defendants do not argue that McGowan failed to exhaust his due process claim and contend only that his First Amendment retaliation claim—left unarticulated in any of his grievances—is unexhausted.

[3] McGowan's assertion that "BOP provided an almost identical response" to his recent administrative grievance alleging that his 2011 re-designation to the CMU was retaliatory, *see* McGowan Opp. at 9, mischaracterizes BOP's response to that grievance. That response noted that McGowan's designation stemmed from his offense conduct as well as his "incarceration conduct," which included "attempts to circumvent communication monitoring policies, specifically those governing attorney-client privileged correspondence." Plumley Decl. Ex. E at 4. This response justified McGowan's second designation to the CMU, thereby refuting the notion that it was the result of retaliation by any BOP officials.

form. Plumley Decl. ¶ 7 & Ex. A. McGowan, furthermore, has been able to articulate highly specific claims in his grievances relating to the CMU, including alleged violations of his due process rights (No. 508242), errors in his Notice of Transfer (No. 509775), and improper denial of transfer out of the CMU (No. 586371). McGowan was thus able to clearly "alert[] the prison to the nature of the wrong" for these claims, *see Strong*, 297 F.3d at 650, yet he failed to do so for his retaliation claim relating to his first designation.

Given this failure, the PLRA mandates that McGowan's retaliation claim now be dismissed, a result that comports with the dual purposes behind the statute. Absent notice of any retaliatory conduct, BOP had no "opportunity to correct its own mistakes" or investigate whether McGowan was placed in the CMU for engaging in a protected activity. *See Woodford v. Ngo*, 548 U.S. 81, 89 (2006) (internal quotation marks omitted). McGowan's failure to exhaust further precluded efficient resolution of the claim and prevented BOP from being able to create an administrative record when evidence was still fresh and available. *See id*. at 95. By attempting to litigate an unexhausted claim, McGowan seeks to engage in discovery about conduct that occurred several years ago relating to a designation unrelated from the one that resulted in his current placement in the CMU.[4] Allowing McGowan to pursue this stale claim would not only undermine the spirit of the PLRA but would also violate the statute's clear prohibition on permitting inmates to litigate unexhausted claims.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their Motion for Summary Judgment with respect to McGowan's retaliation claim.

[4] Following his release from the CMU in 2010, McGowan was later re-designated to a CMU in 2011 based on conduct that occurred while he was in a non-CMU general population environment. Plumley Decl. Ex. E at 4. The Complaint contains no allegations regarding McGowan's 2011 re-designation.

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Respectfully submitted,

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