UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YASSIN MUHIDDIN AREF, *et al.*, **Plaintiffs,** **v.** **ERIC HOLDER, *et al.*,** **Defendants.**	**Civil Action No. 10-539 (BJR)** **MEMORANDUM ORDER**

DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF MCGOWAN'S 2008 RETALIATION CLAIM

This matter is before the Court upon consideration of Defendants' motion seeking summary judgment as to Plaintiff McGowan's 2008 retaliation claim. Defendants argue that Plaintiff McGowan was required under the Prisoner Litigation Reform Act ("PLRA") to exhaust his administrative remedies prior to bringing suit, but failed to do so. Because the Court finds that Plaintiff McGowan exhausted his administrative remedies with respect to the 2008 retaliation claim, Defendants' motion is **DENIED**.

I. BACKGROUND[1]

Plaintiff Daniel McGowan is one of four federal prisoners that brought suit against the Bureau of Prisons ("BOP"), the Chief of the BOP's Counter Terrorism Unit, the Assistant Director of the BOP's Correctional Programs Division, the BOP Director, and the Attorney General of the United States (collectively, "Defendants"). In 2007, Plaintiff McGowan was sentenced to 7 years of imprisonment after pleading guilty to conspiracy and arson. Am. Compl. ¶ 16. He was initially designated to the general prison population. In 2008, Plaintiff

[1] A thorough presentation of the factual allegations can be found in the March 30, 2011 memorandum opinion granting in part and denying in part Defendants' motion to dismiss. *See* Mem. Op. (March 30, 2011), Dkt. No. 37.

McGowan was transferred to a Communication Management Unit ("CMU"), a unit apart from the general population unit that, according to the Government, is designed to house inmates whose communications with the public require enhanced monitoring. According to Plaintiffs, CMU prisoners are not allowed to have any physical contact with visiting friends and families, and the prisoner's access to phone calls and prison programming is severely restricted. Am. Compl. ¶ 2.

The Notice of Transfer that the BOP provided to McGowan stated that the reason for his transfer to the CMU was as follows:

> Your offense conduct included acts of arson, destruction of an energy facility, attempted arson, and conspiracy to commit arson. You have been identified as a member and leader in the Earth Liberation Front (ELF) and Animal Liberation Front (ALF), groups considered domestic terrorist organizations. Your offense conduct included communicating in code and teaching others how to commit crimes of arson. Your actions had the primary purpose to influence and affect the conduct of government, commerce, private business and others in the civil population by means of force, violence, sabotage, destruction of property, intimidation and coercion. Your contact with persons in the community requires heightened controls and review.

Am. Compl. ¶ 135 (quoting from Notice of Transfer, Sept. 3, 2008).

After receiving the Notice of Transfer, on September 11, 2008, Plaintiff McGowan submitted a formal grievance known as a "Request for Administrative Remedy"[2] (identified as Administrative Remedy Number 508242), which read as follows:

> I contend that my placement in the Communications Management Unit (CMU) violates my Constitutional rights. The CMU was established in violation of Federal Regulations and thus, subjects me to due process violations. I request that

[2] The BOP's Administrative Remedy Program is the means by which an inmate 'seeks formal review of an issue relating to any aspect of his own confinement.' 28 C.F.R. § 542.10(a). . . . [T]he inmate may submit a formal written administrative remedy request. 28 C.F.R. § 542.14(a). If the inmate is not satisfied with the Warden's response at this first level of the process, he 'may submit an appeal to the Regional Director,' and if he is not sorry satisfied with the Regional Director's response, he 'may submit an appeal to the General Counsel' at BOP's central office. 28 C.F.R. § 542.15(a).

Morton v. Bolyard, 810 F. Supp. 2d 112, 118 (D.D.C. 2011) (internal alterations omitted); see also Def.'s Mot, Plumley Decl. ¶ 3.

> the [CMU] be terminated or brought into compliance of proper Federal Regulations and that I be transferred to a low-security prison.

Def.'s Mot., Ex. B. In response, the Warden explained that she understood Plaintiff McGowan's complaint to be that his placement in the CMU "violates [his] constitutional rights and [that he was] request[ing] to be placed in a low security institution." Def.'s Mot., Ex. B. After explaining the purpose of CMU placement, and that it would not have any effect on the length of his incarceration nor alter his ability to earn good-conduct sentence credit, the Warden concluded that Plaintiff McGowan's "placement in the CMU does not violate [his] constitutional rights." *Id.*

On September 28, 2008, Plaintiff McGowan appealed the Warden's decision, stating that the reason for the appeal was that his placement in the CMU "violates [his] constitutional rights." *Id.* The appeal was denied, explaining that Plaintiff McGowan "ha[d] provided insufficient evidence that [his] rights are being violated in any way." *Id.* Yet a second appeal was filed, on February 14, 2009, in which Plaintiff McGowan again stated that his CMU placement "is a violation of [his] constitutional rights," and "is not appropriate." *Id.* The second appeal was also denied.

In addition to Administrative Remedy Number 508242, Plaintiff McGowan made a second Request for Administrative Remedy (identified as Administrative Remedy Number 509775) in which he challenged the BOP's characterization of his offense conduct as given in the Notice of Transfer.[3] *See* Def.'s Mot., Ex. C. In other words, Plaintiff McGowan disputed the accuracy of reasons given for his CMU placement. *Id.* This request was denied and Plaintiff McGowan appealed. His appeal was also denied, and the BOP explained that Plaintiff McGowan's "allegation that [he is] inappropriately housed in the CMU" was repetitive of his

[3] Throughout his time in BOP custody, Plaintiff McGowan submitted a total of nineteen Requests for Administrative Remedy, but only the two described herein relate to whether Plaintiff McGowan successfully exhausted his administrative remedies for his claim that his CMU placement in 2008 was retaliatory.

Administrative Remedy Number 508242 and would not be responded to again at the regional appeal level. *Id.* Plaintiff McGowan appealed that decision to the National Inmate Appeal Administrator who broadly described Plaintiff McGowan's argument on appeal as "claim[ing] [that the CMU placement] violates [his] rights." The Administrator concluded that Plaintiff McGowan had been "appropriately designated to the CMU" based on his "involvement in arson and [his] association with the Earth Liberation Front and Animal Liberation Front documented in [his] Pre-Sentence Investigation Report." *Id.*

In August 2010, Plaintiff McGowan was transferred out of the CMU and back into the general prison population. However, in February 2011, he was transferred back to the CMU after he was accused of "circumvent[ing] inmate communication monitoring by having documents mailed to him under the guise of attorney-client privileged communication." Am. Compl. ¶ 146. To date, Plaintiff McGowan remains at the CMU.

In 2010, Plaintiff McGowan, along with three other federal prisoners, commenced this suit. [4] Plaintiff McGovern alleges, among other things, that "[b]y recommending that Plaintiff McGowan be designated [in 2008]. . . to the CMU on the basis of his protected political speech and beliefs, rather than any misconduct in prison, [the Chief of the BOP's Counter Terrorism Unit] unlawfully retaliated against Plaintiff McGowan," thereby violating his First Amendment right to freedom of speech (hereinafter, "2008 retaliation claim"). Am. Compl. § 237. Defendants move for summary judgment as to Plaintiff McGovern's 2008 retaliation claim, arguing that he failed to exhaust his administrative remedies. Should the Court find that Plaintiff McGovern did not initially exhaust, his 2008 retaliation claim would likely be dismissed because, at this juncture, Plaintiff McGovern cannot exhaust his administrative remedies. With

[4] In March 2011, Judge Ricardo Urbina, to whom this case was previously assigned, granted in part the Defendants' motion to dismiss. The matter was reassigned to Judge Richard Roberts, and then reassigned to the undersigned Judge in November 2012.

the motion ripe for consideration, the Court turns to the parties' arguments and the relevant legal standards.

II. ANALYSIS

A. Exhaustion of Administrative Remedies Under the PLRA

Under the PLRA, "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 USCS § 1997e(a). This mandatory "exhaustion requirement applies to all prisoners seeking redress for prison circumstances or occurrences." *Porter v. Nussle*, 534 U.S. 516, 519-20, 524 (2003). "Even if an inmate believes that seeking administrative relief from the prison would be futile and even if the grievance system cannot offer the particular form of relief sought, the prisoner nevertheless must exhaust the available administrative process." *Kaemmerling v. Lappin*, 553 F.3d 669, 675 (D.C. Cir. 2008). "Requiring exhaustion allows prison officials an opportunity to resolve disputes concerning the exercise of their responsibilities before being haled into court. This has the potential to reduce the number of inmate suits, and also to improve the quality of suits that are filed by producing a useful administrative record." *Jones v. Bock*, 549 U.S. 199, 204 (2007).

A defendant may raise a plaintiff's failure to exhaust as an affirmative defense under the PLRA, *id.* at 215-16, and, as such, it is the defendant who has the burden of proof, *Way v. Johnson*, Civil No. 11-1182, 2012 U.S. Dist. LEXIS 138422, at *8 n.3 (D.D.C. Sept. 26, 2012) (quoting *Brengettcy v. Horton*, 423 F.3d 674, 682 (7th Cir. 2005)). A plaintiff's failure to exhaust under the PLRA "is properly raised on a motion for summary judgment, where matters outside the pleadings are considered." *Applewhite v. Bivens*, 717 F. Supp. 2d 68, 72 (D.D.C. 2010) (quotations omitted).

B. The Court Finds that Plaintiff McGowan Exhausted His Administrative Remedies

Defendants argue that "none of the administrative remedy requests filed by McGowan contains an assertion that his 2008 transfer to the CMU was motivated by any retaliatory purpose on the part of the BOP." Defs.' Mot. at 7. Instead, Defendants maintain, Plaintiff McGowan's "grievances are limited to allegations that his procedural due process rights were violated when he was placed in the CMU [], that his Notice to Inmate of Transfer to [CMU] contained inaccurate statements, and that he was improperly denied transfer out of the CMU." *Id.* Defendants contend that BOP was not given notice of Plaintiff McGowan's 2008 retaliatory claim, "including any information regarding the speech or conduct that allegedly triggered BOP's retaliatory response." *Id.* at 9.

In response, Plaintiff McGowan insists that his grievances "more than adequately suffice to exhaust his claim of retaliatory designation to the CMU," particularly when one considers the liberal pleading standard that should apply to a *pro se* prisoners' administrative grievances. Pl.'s Opp'n at 5. Plaintiff McGowan contends that his grievances "plainly alerted BOP officials to the nature of the wrong for which redress was sought." *Id.* He points to the fact that his grievances claimed that the CMU designation had occurred in violation of his constitutional rights and that the BOP's stated explanation for his CMU placement was inaccurate. *Id.* Plaintiff McGowan concludes that he "made it clear that he was inappropriately and unconstitutionally sent to the CMU, that the purported reasons for that designation were factually erroneous, and that he wanted those errors corrected." *Id.* Such grievances, Plaintiff McGowan claims, "gave the BOP all it needed to look into the real reasons [he] was designated to the CMU, and to take appropriate measures to resolve the complaint internally." *Id.* (internal quotations omitted).

"Compliance with prison grievance procedures . . . is all that is required by the PLRA to properly exhaust. The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Jones v. Bock*, 549 U.S. at 218 (refusing to impose a requirement that a prisoner-plaintiff must name all of the defendants during the administrative exhaustion stage where the relevant prison's grievance policy did not require it). "[W]hen an administrative rulebook is silent," as it is here, "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. 2007); *see also Johnson v. Johnson*, 385 F.3d 503, 522 (5th Cir. 2004) ("[T]he grievance must provide administrators with a fair opportunity under the circumstances to address the problem that will later form the basis of the suit."). "[T]he grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming." *Strong*, 297 F.3d at 650.

Plaintiff McGowan filed two grievances, Administrative Remedy Number 508242 and 509775, which respectively alerted BOP to Plaintiff McGowan's claims that his CMU designation in 2008 was unconstitutional and based on inaccurate facts. The Warden's response to Administrative Remedy Number 508242 describes Plaintiff McGowan as complaining about the unconstitutionality of his 2008 CMU designation, an understanding echoed at the Regional appeal level. The Regional appeal level went so far as to broadly say that Plaintiff McGowan "ha[d] provided insufficient evidence that [his] rights are being violated in any way." The Regional appeal decision did not limit his "rights" to his due process rights, leaving this Court to conclude that McGowan's complaint asserting the unconstitutionality of his CMU designation, as broad as it may have been, was considered and rejected by the BOP.

Furthermore, Administrative Remedy Number 509775 gave the BOP notice of Plaintiff McGowan's claim that he had been designated to the CMU for false reasons. Tellingly, in its response to McGovern's initial appeal of grievance 509775, the BOP remarked that McGovern's grievance had included an "allegation that he [was] inappropriately housed in the CMU," and stated that this was repetitive of Administrative Remedy Number 508242 and would not be responded to again. Thus, the BOP interpreted the first grievance (complaining of unconstitutionality of the CMU designation) and the second grievance (complaining of the inaccuracy of the facts in the Notice of Transfer justifying the CMU designation) as complaining of the same thing: that the CMU designation was improper. In sum, the BOP was on notice that Plaintiff McGowan believed that he was placed in the CMU for false and improper reasons that violated his constitutional rights. Given that he filed these grievances pro se and the liberal reading that this Court must accord a complaint filed without the aid of counsel, Plaintiff McGowan did all that was necessary to exhaust his administrative remedies for his 2008 CMU designation retaliation claim.

Plaintiff McGowan did not have to assert with specificity the legal theories under which he believed that the designation was improper. *See e.g.*, *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009) (explaining that a grievance need not include legal terminology or legal theories if it sufficiently provides notice of the harm being grieved). Therefore, the fact that Plaintiff did not state specifically in his administrative grievances that the 2008 CMU designation was done in retaliation for his speech does not mean he has not exhausted his administrative remedies. *See Tennille v. Quintana*, 443 F. App'x. 670, 672-73 (3d Cir. 2011) ("Although [the plaintiff's] administrative grievances did not cite the specific constitutional grounds on which his complaint is based, we conclude that he properly exhausted his administrative remedies."); *Norwood v. Robinson*, 436 F. App'x. 799, 800 (9th Cir. Cal. 2011) (determining that the plaintiff exhausted

his administrative remedies for retaliation even though "the grievance did not advance the legal theory of retaliation" because "it gave the prison adequate notice of the harm being grieved"). Accordingly, Plaintiff McGowan did not fail to exhaust his administrative remedies. ,

III. CONCLUSION & ORDER

For the foregoing reasons, the Court **DENIES** Defendants' Motion for Summary Judgment.

SO ORDERED.

February 19, 2013

Barbara J. Rothstein

BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE