

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION**

**AFTAB AHMED KHAN,
Reg. #09260-062**

PLAINTIFF

v. CASE NO. 2:09cv00077 BSM

UNITED STATES OF AMERICA

DEFENDANT

ORDER

The proposed findings and recommended disposition submitted by United States Magistrate J. Thomas Ray [Doc. No. 43] have been received, and Aftab Khan has objected. [Doc. No. 45]. After carefully considering these documents and making a *de novo* review of the record, the recommendation that summary judgment be granted in favor of the United States is adopted but the determination that an *in forma pauperis* appeal would not be taken in good faith is rejected.

Section 522(h) of BOP Policy Statement 5566.06 raises a question as to whether the correctional officer herein was performing a discretionary function once he had notice that the restraints he placed on Khan were applied too tightly. In pertinent part, that section reads, “Restraint devices (e.g., handcuffs) may not be used in any of the following ways: . . . (3) in a manner that causes unnecessary physical pain or extreme discomfort.” Although the words “unnecessary” and “extreme” seem to create enough ambiguity that it appears an officer is still performing a discretionary function even if he knows the restraints are applied too tightly, Khan’s argument that this regulation specifically prevents a particular course of conduct has merit. Therefore, the recommendation that an *in forma pauperis* appeal would

not be taken in good faith is rejected.

IT IS THEREFORE ORDERED that the United States' motion for summary judgment is GRANTED and this case is dismissed with prejudice.

IT IS SO ORDERED this 14th day of March, 2011.


UNITED STATES DISTRICT JUDGE