ed no e-mails from Nutter's inbox between January 1 and July 19, 2007, and none from Commissioner Bridinger's inbox or sent-messages folder. The applicant claimed that Nutter admitted to deleting e-mails he received between January 1 and July 19, 2007, and that Bridinger admitted he deleted all e-mails until recently. There were also substantial gaps between the dates of e-mails provided by another commissioner. Under the County schedule for records retention and disposition, e-mail that had significant administrative, fiscal, legal, or historic value had to be retained; others could be deleted. According to the Board's clerk, the individual computer user was responsible for making the determination of when an e-mail could be deleted. The Board advised that it and its IT contractor had searched every computer hard drive of every person from whom e-mails were requested, and it provided every available document responsive to the request. Deleted e-mails could be possibly be retrieved from a hard drive with "very expensive forensic tools," but "that information would be considered deleted by the user and would not be available to the user." The company nonetheless applied to compel the Board to, among other things, recover the content of requested e-mails that had been deleted by the commissioners, and to make the recovered e-mails promptly available for inspection and copying. It argued that when a public officer "unlawfully" destroyed public records but the contents of the records could be recovered or restored, the public office's obligation to maintain the records included an obligation to take the necessary steps to restore the records and to make them available under the State's Public Records Act.

The court started with the proposition that deleted computer files, whether they were e-mails or otherwise, were retrievable or discoverable, as "the mere deletion of some of the e-mails by the commissioners did not necessarily destroy them." The applicant's computer expert indicated that at least some of the deleted messages could be retrieved through forensic recovery techniques. Second, the court found that it was a reasonable inference that the e-mails had been deleted in violation of County policy. There were substantial gaps in the responsive e-mails provided, and no incoming or outgoing e-mails were provided from Commissioner Bridinger's public account. "These facts raise the reasonable inference that the e-mails were deleted in violation of the county's records retention and disposition schedule; it defies logic that all public-office e-mail during these lengthy periods lacked significant administrative, fiscal, legal, or historic value." As these were public records, the "mere fact" that the cost of the recovery services could be expensive did not bar the court from ordering that recovery be attempted.

Several factors supported having the Board bear the expense of the forensic recovery of the deleted e-mails, including the fact that the Board failed to maintain the requested e-mails in accordance with the applicable schedule for records retention and disposition. Accordingly, the court granted the application to compel the Board to make reasonable efforts to recover, at its expense, the requested deleted e-mails and to make them promptly available for inspection. The court added, however, "that in cases in which public records, including e-mails, are properly disposed of in accordance with a duly adopted records-retention policy, there is no entitlement to these records under the Public Records Act." *State ex rel. Toledo Blade Co. v. Seneca County Bd. of Comm'rs*, No. 2007-1694, 2008 WL 5157733 (Ohio Dec. 09, 2008).

## *Search and Seizure*

### Traffic Stops—Tandem Drivers

The issue in this case was whether there was sufficient evidence of tandem driving such that probable cause to arrest the driver of one vehicle established probable cause to arrest the driver of a second vehicle. A police officer in New Mexico, Officer Marquez, saw Rodriguez-Rodriguez ("Rodriguez") driving a red Nissan just ahead of a brown pickup truck. Both vehicles had California plates and both were traveling at a speed below the speed limit. The driver of the brown pickup was stopped for a traffic violation, refused to answer questions, and tried to run away. The officer smelled marijuana and a large bundle of it was visible in the cab of the truck. Marquez contacted deputies to intercept the Rodriguez vehicle, and it was stopped some six miles away. Rodriguez consented to a search of his vehicle, where evidence was discovered linking him to the driver of the brown truck. Rodriguez was taken into custody, admitted to working in conjunction with the driver of the brown truck in the transport of marijuana, and was charged with various drug offenses. He sought to suppress the evidence, arguing that his traffic stop violated the Fourth Amendment because it was not supported by reasonable suspicion, and that his investigative detention amounted to an illegal arrest because it exceeded the scope of any arguably permissible stop and because the officers lacked probable cause to believe that he had violated the law.

The U.S. Court of Appeals for the Tenth Circuit affirmed the denial of his motion to suppress evidence. The critical question was whether Officer Marquez had probable cause to believe that Rodriguez was committing a crime. "Sufficient evidence that two vehicles are driving in tandem plus evidence that one vehicle contains contraband can provide probable cause sufficient to support arresting the driver of the other vehicle." Here, there was "considerable objective evidence that the brown pickup and red Nissan were driving in tandem," as the two vehicles traveled a mere two car lengths apart on a highway in very light traffic; Rodriguez abruptly sped off when Marquez stopped the pickup; and the driver of the pickup seemingly waited for Rodriguez's vehicle to elude Marquez's range of vision before he pulled over. When Officer Marquez discovered that the pickup truck was carrying marijuana, the evidence of tandem driving created probable cause that Rodriguez was committing a crime as well. This

probable cause was sufficient to support his traffic stop and any subsequent arrest. Rodriguez's constitutional rights were not violated even if his detention was an arrest, since the initial stop was permissible. *United States v. Rodriguez-Rodriguez,* No. 07-2214, 2008 WL 5340311 (10th Cir. Dec. 24, 2008).

### Extra-Jurisdictional Arrests

Engleman, while staying with his parents in Oklahoma, noticed some prowlers and dialed 911. The call was routed to the local county sheriff's office, located in Arkansas, and Deputy Sheriff Murray and others were sent to investigate. The call was taken from a telephone number with an area code assigned to northwestern Arkansas, and the address given was a street address in Arkansas. While en route, the officers learned of an outstanding warrant for Engleman. The officers arrived and informed the parents about the warrant, and located Engleman in the home. Both Engleman and his father took the position that, as the house was actually in Oklahoma, not in Arkansas, the officers could not arrest Engleman. (Arkansas law authorized law enforcement officers to execute its arrest warrants "in any county in the state," but did not authorize out-of-state arrests.) Nonetheless, the officers arrested Engleman and took him to the county jail. Engleman brought suit under 42 U.S.C. § 1983, alleging that the officers used excessive force in violation of the Fourth Amendment, and that the arrest in Oklahoma was unreasonable under the Fourth Amendment: by arresting him in Oklahoma on an Arkansas warrant, Deputy Murray exceeded his jurisdictional authority, which violated Engleman's Fourth Amendment right to be free from unreasonable seizures. In the course of litigation, a satellite positioning system revealed that, while the postbox for the Engleman property was in Arkansas, the actual house itself was located in Oklahoma. The defendants moved for summary judgment, arguing that they were entitled to qualified immunity.

*continued on page 38*

## Inside IMLA *continued from page 5*

These revenues help support our advocacy program and some of our other services, such as this magazine and our e-newsletters. The revenues also support some of our newer projects. As you know, we have started some groups for people with common interests. These groups include dedicated listservs and regular conference calls. The groups include "code enforcement," "coastal communities," "capital cities," "sports cities," "university cities/college towns," "counties," and will include "border communities," and "young lawyers." While the listservs are fairly inexpensive to operate, the conference calls are another matter. These groups provide great opportunities for our members to network with attorneys in other communities with common interests and common practice areas. We need additional revenues to sustain them.

Enough whining! We have a terrific program planned for the Seminar in April and we are already developing, with the City of Miami, a program for the Annual Conference that will be one of our best ever. If you have a construction project that has been affected by the economic slowdown and is late, in default, or you have claims, you will not want to miss our Annual Construction Law program, scheduled for March 1–3, 2009 in San Diego. **ML**

## The Americans with Disabilities Act *continued from page 11*

*Accord,* Jarvis v. Potter, 500 F.3d 1113, 1121-22 (10th Cir. 2007) (court upholds termination of a postal worker who suffered from post-traumatic stress disorder, PTSD, and who would physically attack coworkers who startled him, under a "direct threat" defense).
37. *Id.* at 1087.
38. Sista v. CDC Ixis North America, Inc., 445 F. 3d 161 (2d Cir. 2006).
39. *Id.* at 169-74.
40. 117 F. 3d 351, 353 (7th Cir. 1997).
41. *Sista,* 445 F. 3d at 172-73. *But see* Husowitz v. Runyon, 942 F. Supp. 822, 832 (E.D.N.Y. 1996) (noting the Second Circuit rejects the distinction between a handicapping condition and specific conduct resulting from the condition in determining if an employer's decision to take action against an employee is based on the plaintiff's disability, relying on *Teahan v. Metro-North Commuter R.R. Co.*, 951 F. 2d 511, 515-17 (2d Cir. 1991)).
42. The majority of municipal employees have property interests in their employment, requiring cause for discharge. *See, e.g.*, Gilbert v. Homar, 520 U.S. 924, 928-29 (1997) (employees who can be discharged only for cause have a constitutionally-protected property interest in their tenure and cannot be fired without due process).
43. Generally, "just cause" factors include: (1) whether the employee had forewarning or foreknowledge of possible disciplinary consequences of his misconduct; (2) whether the employer's policy or rule is reasonably related to the orderly, efficient, and safe operation of the agency; (3) whether a fair investigation was conducted prior to imposing discipline; (4) any proof of misconduct; (5) whether the policy or rule was applied evenhandedly to all similarly-situated employees; (6) whether the punishment fit the severity of the conduct, in light of progressive discipline; and (7) any mitigating circumstances. *See* Discipline & Discharge in Arbitration, 33-35 (Norman Brand, ed., BNA Books 1998).
44. *See* Pence v. Tenneco Auto. Operating Co., Inc., 169 Fed. App. 808, 811 (4th Cir. 2006) (upholding an employer's decision to send an employee to the employer's doctor for medical evaluation for egregious behavior before interviewing him).
45. An excellent resource that addresses these questions is Beth Bates Holliday, Annotation, *Use of "Last Chance" or "Return to Work" Agreements Under Americans with Disabilities Act,* 6 A.L.R. Fed. 2d 453 (2005).
46. *See supra,* note 33. **ML**

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