In advising police departments, a word to the wise would be to make sure that officers be attuned to the arrestee's situation and where cuffing the person with hands behind would injure the person or cause more than the normal pain, rethink doing so and have available well articulated reasons for using the technique employed.

http://media.ca1.uscourts.gov/pdf.opinions/14-1379P-01A.pdf (last accessed Dec. 17, 2014)

Curley v. City of North Las Vegas – ADA, retaliation, termination

This case involves a claim by an employee that his termination constituted retaliation for filing EEOC claims and for seeking protection under the ADA. The facts of the case paint a different picture and remind those of us who advise HR professionals and employers that some employees can be difficult. Mr. Curley worked for the City of North Las Vegas (based on the facts using the term "work" may be an overstatement, but he was employed there). His duties included cleaning out sewers to protect against blockages. Apparently, Mr. Curley had difficulty hearing and sought accommodations under the ADA filing complaints with the EEOC on two occasions. In his last effort for accommodation he asked the city to relieve him from having to be around trucks with loud engines. As the City could not accommodate that request, it denied it. Not long after, another employee tried to communicate with Mr. Curley on the job, but Mr. Curley was wearing ear protectors and could not hear him. As the court described the incident "The coworker asked Curley to remove his hearing protection so that the two of them could communicate about a work-related task. In response, Curley began swearing and asking the coworker whether he thought he was a doctor. The incident prompted the City to place Curley on administrative leave and to launch an investigation into his behavior."

The investigation revealed a number of troubling facts. Mr. Curley had repeatedly threatened his coworkers and their families. He "threatened to put a bomb under a car, insinuated that he had mafia connections, and talked about giving a "blanket party"—which would involve throwing a blanket over a person's head and beating him. One coworker reported that Curley threatened to kick his teeth out if the coworker did not join a union. On another occasion, Curley threatened to shoot his supervisor's children in the kneecaps." The City also discovered that Curley "regularly conducted personal business while at work, sometimes spending up to three hours on his cell phone;" and "that he was operating an ADA consulting business" on the job. Based on these facts, Mr. Curley was discharged.

The Ninth Circuit concluded that the City's description as to why Mr. Curley was discharged was not pretextual and further concluded that Curley could not show that the reasons were pretextual. In discussing Curley's claim that the City's tolerance of his bad conduct over the years coupled with the temporally close decision to discharge him after an ADA complaint, the Court found that the city's investigation disclosed to it new

information about the extent and severity of Mr. Curley's conduct and that his acts after his last effort to claim protection under the federal law all compounded to justify the city's decision.

http://cdn.ca9.uscourts.gov/datastore/opinions/2014/12/02/12-16228.pdf (last accessed Dec. 17, 2014)

Newman v. Twp. of Hamburg – malicious prosecution, qualified immunity, probable cause

Daniel Newman was convicted of murder. Fifteen years later, a panel of the Sixth Circuit granted his petition for habeas corpus and found that a reasonable jury could not have convicted him on the evidence presented. Newman sued to recover damages for his wrongful conviction claiming among other things that one of the officers lied in overstating probable cause for his arrest and sought damages for malicious prosecution. The lower court denied the officer's claim of qualified immunity and the Sixth Circuit reversed. Factually, the court concluded that the officer's statement of probably cause while at odds with the statement of another officer was not so factually different to prove the officer misstated facts so much as it reflected the officers had different recollections of what they had been told.

The Sixth Circuit explained why probable cause is a legal issue and how Rule 56 is intended to work: "Newman responds that only a jury may make the probable cause determination. He is half right. If he presents sufficient evidence that would allow a reasonable jury to find that no probable cause existed for his arrest, he indeed may take his claim to a jury. But the point of Civil Rule 56 is to prevent claims from going to a jury when the court, after drawing all inferences in favor of the non movant (here Newman), determines that no reasonable jury could make such a finding. That is this case. Where the requisite material facts are not in dispute, as is true here, probable cause "retains its legal character" and must be decided by the court. *Hale v. Kart*, 396 F.3d 721, 728 (6th Cir. 2005)."

http://www.ca6.uscourts.gov/opinions.pdf/14a0292p-06.pdf (last accessed Dec. 17, 2014)

AGI v. Town of Hickory – governmental immunity, proprietary, airports

Only those of us in municipal law worry about the governmental – proprietary distinction and while it varies from state to state, this case reminds us to consider the distinction as it may arise in our own states to our own clients. The setting here is North Carolina and concerns a question of North Carolina law: whether governmental immunity from equitable claims is waived when a county or municipality acts in a proprietary, rather than governmental, capacity.