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Civil Liability for Acts of Off-Duty Officers – Part Two

Contents

1. Introduction.

In the first part of this two article series, general principles regarding civil liability for the actions of off-duty police officers were examined, followed by a discussion of case law concerning arrests made by off-duty officers. Links were also provided to some sample policies concerning the actions of off-duty officers, some of which may be relevant to the topics addressed in this second part of the article.

This segment of the series discusses civil liability for off-duty police officers' use of force, and involvement in off-duty vehicle related cases.

2. Use of Force

Private fights involving off-duty officers, which might otherwise simply result in state law claims for assault and battery may be converted, in some instances, into federal civil rights lawsuit simply by virtue of the fact that the off-duty officer asserts their official authority, arguably even erroneously, as when they may assert authority that they arguably do not possess. An off-duty, non-uniformed jail commander was found to have acted under color of law, for instance, while allegedly beating a motorist who rear-ended his pickup truck when he asserted his law enforcement authority by saying he was "a cop" in order to prevent bystanders from interfering with his assault. Anderson v. Warner, No. 04-15505, 451 F.3d 1063 (9th Cir. 2006).

In the ensuing federal civil rights lawsuit, the defendant jail commander argued

that, as a custodial officer, he had no authority to try and prevent the other driver from leaving the scene of the accident, or to issue commands to the crowd that had gathered at the scene. He claimed that because he was a "custodial officer," rather than a "peace officer" under California law, he could not have been acting under color of state law when he allegedly assaulted the plaintiff motorist.

The appeals court disagreed. In these circumstances, the defendant jail commander was acting, purporting, or pretending to act in the performance of his official duties, had the purpose and effect of influencing the behavior of others, and was related to his governmental status.

It was clear, the appeals court found, that the defendant pretended to act in performance of his official duties, and that these actions had the purpose and effect of discouraging bystanders from interfering.

The requirement that the defendant's conduct must be related either to his governmental status or to the performance of his official duties, the court reasoned, cannot mean that an officer has to be acting within the scope of his authority in order for him to have been acting under color of state law.

If that were true, the court noted, no federal civil rights lawsuit could ever be successful, because such a lawsuit is based on the claim that the officer acted illegally--or outside the scope of his authority.

In this case, it was clear that the defendant jail commander used his "governmental status" to influence the behavior of the crowd of bystanders. The word "cop" used by the defendant is a "generic, non-technical term," the court found. While it can refer to a "peace officer" under California law, it can also include the jail commander's status as a "custodial officer."

The court found that if the defendant had been a janitor at the county jail, yet claimed to be a "cop," that would not have been enough to turn his conduct into action under color of state law, because the term "cop" would have inaccurately described his status. But in this case, the defendant was a lieutenant in the Mendocino County Sheriff's Department, and the commander of the county jail. "Cop," the court found, is a "sufficiently capacious term to include that status."

On the other hand, in another case, a trainee, who was not “on duty,” as he was also not yet an officer, was found not to have acted as law enforcement when he acted for personal and criminal reasons. The city was found not liable for his misconduct, when the police trainee who was allowed the use of a marked unit to drive to the police academy stopped and shot a man for the purpose of robbing him. Trainees, the court noted, had no police powers, and his motivations were

criminal. Georgia Interlocal Risk Management Agency v. Godfrey, 273 Ga. App. 77, 614 S.E.2d 201, 2005 Ga. App. Lexis 381 (2nd Dist. 2005); cert den. 2005 Ga. Lexis 691.

Sometimes, courts have ruled that the fact that an officer may have had some personal motivations for their actions will not be sufficient to take those actions outside of the scope of their employment when they assert their official police authority in the course of doing so. New York intermediate appellate court upholds $321,000 jury award against city to motorist allegedly knocked to the ground and punched in the face by an off-duty police officer after he rear-ended the officer's vehicle. Evidence was sufficient to show that the officer was acting within the scope of his employment and used excessive force when the officer requested the motorist's driver's license and detained him for up to half an hour until other police arrived. Graham v. City of New York, 770 N.Y.S.2d 92, 2003 N.Y. Slip Op. 19714 (A.D. 2nd Dept. 2003).

Purely personal motivations, however, combined with no assertion of police authority, will most likely result in a determination that an off-duty officer was not acting within the scope of his employment for purposes of state-law claims, and not acting under color of state law for purposes of federal civil rights liability. A city and its police chief were held not liable for an off-duty officer's alleged shooting and killing of a man during a fight that occurred when he accompanied a friend to assist him in a property dispute with his ex-wife in another jurisdiction. The officer was then in plain clothes, had no police authority in that jurisdiction, did not identify himself as a police officer, and was acting for his own private purposes. The officer's alleged misuse of his weapon, the court found, was not foreseeable and there was no basis for a claim for negligent retention and supervision of him. Phelan v. City of Mount Rainier, No. 98-CV-1096, 805 A.2d 930 (D.C. 2002).

On the other hand, sometimes even a display of police credentials will not alter the fact that an off-duty officer is engaged solely in a private fight at the time. In one such case, an off-duty officer was found not to have acted under "color of state law" as required for federal civil rights liability when he shot and killed another man outside a bar where they began to argue. The fact that officer displayed police identification and used a department service revolver did not alter result when incident was essentially a "private brawl," the court concluded. Parrilla-Burgos v. Hernandez- Rivera, 108 F.3d 445 (1st Cir. 1997).

Some police departments have been held liable for the off-duty actions of officers in connection with the use of force on the basis of what was known about the officer's alleged prior misconduct, and the failure to take appropriate action. In one such case, a police department was found liable for $594,480 to the surviving

family of a man shot and killed by off-duty officer angry that he was having an affair with officer's wife. The lawsuit claimed that the department knew that officer had previously, while off-duty, beaten his own wife, but failed to take preventative measures to stem officer's "violent propensities" Thomas v. Los Angeles Police Department, No BC086856, LA Superior Court Glendale, May 18, 1995, reported in Los Angeles. Daily Jour. (Verd. & Stl.), page 4, June 16, 1995.

Reasoning to the contrary is found in Burkhart v. Knepper, 310 F. Supp. 2d 734 (W.D. Pa. 2004), finding that a city was not liable for the alleged wrongful shooting and killing of a woman by off-duty police officer, despite alleged awareness of officer's "violent behavior" towards the victim on prior occasions and his alleged substance abuse. In addition to the officer not being on duty at the time of the incident, the court stated, the police department was not notified of the situation occurring at the victim's residence, and was therefore not aware of any need to intervene.

Policies which state that officers are always “on duty,” and should always be armed, may result in a duty on the part of the city or department to provide appropriate guidance and training as to the implications of that policy, and as to how they should conduct themselves during the time that they would ordinarily be considered “off-duty.” In one case a city was found liable for $400,000 to a motorist shot by off-duty Colorado officer. The department had adopted a policy requiring officers to always be on duty and always be armed, but provided no training on how to handle police response when off-duty, and without a police vehicle, uniform, or radio. Brown v. Gray, No. 99-1134, 227 F.3d 1278 (10th Cir. 2000).

The off-duty possession of weapons by officers may also sometimes result in liability for their arguably foreseeable misuse by others. In another case, a court found that an officer's "negligent storage" of his weapon at home was "incidental" to his employment. The city was therefore vicariously liable for $1.575 million to the estate of a minor shot and killed by officer's minor son, who obtained the gun from an unlocked cabinet in the house. Gaffney v. City of Chicago, 706 N.E.2d 914 (Ill. App. 1999). A decision to the contrary is Joseph v. City of Buffalo, 83 NY 2d 141, 608 N.Y.S.2d 396, 629 N.E.2d 1354 (1994). (City was not liable for gunshot wound off-duty officer's son suffered after officer left his service revolver under son's mattress in bedroom; department rule requiring officers to carry their weapons while off-duty did not vary result).

A lack of permission by a department to work as security personnel while off-duty may sometimes have an impact on departmental liability for off-duty conduct. In one case, off-duty police officers, not in uniform, and working as security guards at private party without departmental knowledge or permission,

were found not to have acted as peace officers when they allegedly kicked and shot a man, rendering him paraplegic. A jury award of $8.7 million to the man and $1.5 million to his wife therefore could not be imposed on the city. Melendez v. City of Los Angeles, 63 Cal. App. 4th 1, 73 Cal. Rptr. 469 (1998), review denied, 1998 Cal. Lexis 4213. See also, Huffman v. County of Los Angeles, # 97-55176, 147 F.3d 1054 (9th Cir. 1998). (Off-duty intoxicated deputy's action of shooting and killing man in barroom brawl was unforeseeable; county could not be held liable for failure to warn deputies against carrying firearms while intoxicated; county's policy prohibiting deputies from being "drunk and disorderly" in public was sufficient.).

3. Off-Duty Vehicle Related Cases

A police officer's status may sometimes be "off-duty," despite the fact that they are then operating a police vehicle. In the course of doing so, situations may occur which require the off-duty officer to perform law enforcement functions, often at a moment's notice. In Harris County v. Gibbons, No. 14-02-00398-CV, 150 S.W.3d 877 (Tex. App. 14th Dist. 2004), for instance, even though a deputy sheriff was technically off-duty at the time his patrol car struck another vehicle in the rear, he was acting within the scope of his employment. The accident allegedly occurred when he glanced down at his computer terminal to see the result of his inquiry as to whether a truck nearby was stolen, which fell within the performance of his duties. Further, his doing so was a "ministerial" act rather than a discretionary one, so that he was not entitled to official immunity under Texas state law. A Texas appeals court upholds $27,000 jury award to motorist against county.

The prospect that the off-duty officer might later resume his duties, however, is different from being engaged in doing so at the time of an accident. One court found that a New Jersey city would not be held vicariously liable for an officer's auto accident, hitting a pedestrian while driving his own vehicle home for lunch, and that the mere possibility that he could be required to take action if he witnessed a crime did not render him "on duty." Rogers v. Jordan, 773 A.2d 116 (N.J. Super. A.D. 2001).

The actions of an off-duty officer in operating a vehicle, including allegedly doing so in a criminal manner, such as under the influence of alcohol, may also possibly result in civil liability for other officers or the department on the basis of what they know about this conduct, and their own action or inaction in relation to it. In Pena v. Deprisco, No. 03-7876, 432 F.3d 98 (2d Cir. 2005), a federal appeals court found that police officers and supervisors' alleged encouragement and "active facilitation" of an off-duty officer's drunken driving during a twelve-hour drinking binge could constitute a "state-created danger" violating the due process

constitutional rights of a pregnant woman, her fetus, and two others struck and killed by the off-duty officer as he sped through a red light.

When the off-duty officer first applied for police employment in 1984, he had disclosed his history of drinking problems to the city, according to the court, interpreting the available evidence in the light most favorable to the plaintiffs. While he allegedly continued to drink heavily during his time as a member of the police force, the plaintiffs claimed that he was never questioned, disciplined, or counseled about his alcohol use, and it was a common practice for both off-duty and on-duty officers to drink at or near the police precinct house. This drinking was allegedly done, at least in part, in public and with the full knowledge of the officer's superiors.

On the date of the incident, August 4, 2001, the officer ended his shift at 8 a.m., and he then embarked on a 12-hour drinking binge, according to the plaintiffs. The binge began in the company of fellow officers and supervisory police sergeants in the parking lot of the police station. Around noon, his supervisor, who had been drinking with the rest of the group in the precinct lot, allegedly asked the off-duty officer to drive him to a local "strip club," called "The Wild, Wild West.” The bar had allegedly been declared off-limits to police officers by department officials, a designation that the officers ignored that day as they apparently had in the past. The off-duty officer drove the supervisor to the bar, where other officers allegedly joined them.

Four or five hours later, eight hours into the off-duty officer's drinking for the day, his supervisor allegedly asked him to drive him back to the precinct house. The off-duty officer entered the premises to use the toilet, and, although he was allegedly visibly intoxicated, neither the desk sergeant, the patrol sergeant, or any of the on-duty officers present did anything to reprimand him or prevent him from leaving, returning to the driver's seat of his vehicle, or driving away drunk. He then allegedly drove back to the strip club, where he continued drinking.

Two or three hours later, after more drinking, he started to return to the precinct for his next shift. It was at this point, having been drinking continuously for nearly twelve hours, and having not slept in more than 24 hours, that he sped through multiple red lights, and without sounding his horn or braking, struck and killed an eight-and-a-half months pregnant woman, her son, and her sister as they attempted to cross a street at a crosswalk in compliance with the walk signal. The baby she was pregnant with also died shortly after his birth by cesarean section at a hospital after the accident.

The off-duty officer, who resigned from the police force, was later convicted of driving while intoxicated, driving with a suspended license, and four counts of

second-degree manslaughter for recklessly causing the four deaths.

The federal appeals court found that the claimed conduct of "actively facilitating" the off-duty officer's continual drinking and his intoxicated driving stated a possible claim for violation of due process. Merely failing to "intercede" on the day of the accident or the alleged actions of supervisors in standing by and doing nothing to punish the off-duty officer's previous misconduct, the appeals court found, was insufficient to amount to a "state-created danger."

Encouraging and communicating to the officer that he was free to drink to excess and drive in that condition, including encouragement and facilitation of supervisory personnel, however, could amount to facilitating the off-duty officer's conduct and amount to such a "state-created danger" resulting in the decedents' deaths.

The defendants emphasized that the officers who drank with the off-duty officer were themselves "off-duty" at the time. The appeals court stated that "the fact that an officer is off-duty does not prevent him or her from giving assurances about what he or she or other police officers will or will not do when acting as police officers."

> The relationship between the on- and off-duty police officer defendants with off-duty police officer Grey surely provided them with the opportunity to communicate their encouragement and approval of his behavior. While it may be more difficult for the plaintiffs to prove that the off-duty officers communicated official sanction of Grey's conduct, it does not negate, as a matter of law, the possibility of such a communication.
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> We conclude that when, as the plaintiffs allege, state officials communicate to a private person that he or she will not be arrested, punished, or otherwise interfered with while engaging in misconduct that is likely to endanger the life, liberty or property of others, those officials can be held liable under section 1983 for injury caused by the misconduct [...]. This is so even though none of the defendants are alleged to have communicated the approval explicitly.

In this case, the appeals court noted that the defendants, on the facts alleged, had ample opportunities, before and during the day in question, to decide what to do and say in response to the alleged practice of drinking and driving by off-duty officers. The alleged pre-accident behavior of a number of the individual defendants over an extended period of time, and in the face of the "obvious risk of severe consequences and extreme danger" from such drunken driving could be found to be "conscience shocking, in a constitutional sense," and the individuals could be found to have acted with deliberate indifference to a known risk of such

harm.

While the "state-created-danger" basis for liability was found to apply to "implicit prior assurances by police officers of impunity for drunken driving," the appeals court found that this principle was not clearly established at the time of the incident, entitling individual defendants to qualified immunity from liability for pre-accident conduct claimed to violate due process.

A New York case involving another off-duty officer who allegedly drove while intoxicated, however, reached a different result under state law. The city was held not vicariously liable for an off-duty officer's alleged action of injuring a pedestrian while driving in an intoxicated condition, or for the failure of another off-duty officer, a passenger in the vehicle, to prevent the first officer from driving. Carroll v. City of New York, 730 N.Y.S.2d 548 (A.D. 2001).

In yet another case, however, a court also found that an off-duty, but "on-call" police officer did not act within the scope of his employment in driving a city vehicle, allegedly under the influence of alcohol, and striking and killing a man doing yard work, and then leaving the scene without rendering assistance to the victim. The officer was then engaged in doing personal errands, the court reasoned, and his actions were in no way for the benefit of the city. Russell v. City of Memphis, 106 S.W.3d 655 (Tenn. Ct. App. 2002).

The City of New York was found not liable for an off-duty officer's action in connection with dispute with another motorist. The off-duty officer was not in uniform, did not display his badge, and gave no indication that he was a police officer until after the other motorist obeyed his signal to pull his vehicle over to the side of the road. The officer acted on the basis of purely personal motives stemming from a traffic altercation with the other driver as the two passed through a toll plaza. The officer was not acting within the scope of his employment at the time of the incident. White v. Thomas, 784 N.Y.S.2d 54, 2004 N.Y. Slip Op. 07932 (A.D. 1st Dept. 2004).

The fact that the off-duty officer may still be driving a police vehicle will not, by itself, be dispositive of whether or not he is acting as law enforcement. In one case, a police officer whose department vehicle collided with another motorist's car was found not to be acting within the scope of his employment, since his normal tour of duty had ended, and he was using the police car to go to a football game. The city was accordingly not liable for any damages Smith v. Rice, 613 So.2d 741 (La App. 1993).

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