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## Civil Liability for Acts of Off-Duty Officers – Part I

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#### 1. Introduction.

Off-duty police officers, in some instances, encounter situations in which they may be called upon, at a moment's notice, to act in their law enforcement role. Additionally, some off-duty officers are engaged in secondary employment, including jobs in private security. Off-duty officers, like all people, also become involved in disputes of various kinds with other individuals, including physical altercations and vehicular accidents.

A good number of lawsuits, in both federal and state court, have attempted to impose civil liability on the off-duty officers themselves and/or on their municipal employer, under a variety of rationales. The issue arises whether and when the off-duty officer is acting in their capacity as law enforcement, when they are acting on behalf of their secondary employer, such as a store or business for which they provide security or other services, and when they are acting in a purely personal capacity.

This article, the first of two, briefly examines some of the existing case law on this question, with a focus on cases involving off-duty arrests. Cases involving off-duty police officers run the full gamut of areas in which civil liability is at issue for law enforcement, including search and seizure, use of force, including deadly force, and vehicular accidents, among others. A second article on this topic will focus on cases involving the off-duty use of force, and off-duty use of vehicles. No discussion is included concerning employment law aspects of secondary employment (moonlighting) of off-duty officers. At the conclusion of

this article, a number of specimen policies which police departments have adopted concerning off-duty conduct by officers are listed, with links to their full text.

### 2. General Principles

Clearly, when a police officer is on-duty, in uniform, displaying his or her badge, equipped with the weaponry, lethal and less lethal, provided by the department, and engaging in the performance of their law enforcement duties, there is no doubt that they are a police officer, and to be judged by the standards, laws, and rules applicable to law enforcement. Additionally, for purposes of federal civil rights liability, they act "under color" of state law.

Additionally, for purposes of liability under state law, such as for assault and battery, false arrest, malicious prosecution, or negligence in the operation of a vehicle, so long as they act within the scope of their employment, both they and their employer may be liable for misconduct causing injuries or damages to others, including vicarious liability for the employer.

What about officers who are off-duty, but still in uniform? Off-duty, but still in possession of their department issued weaponry? Off-duty, but providing security for a private business?

Courts in different jurisdictions have reached differing results as to when such off-duty officers and their conduct, for purposes of civil liability under federal and state law, are to be evaluated as law enforcement personnel, and when they are to be regarded as private persons.

The question of whether or not the officer is in uniform, however, standing alone, is not dispositive of the issue of whether or not they are acting as an officer or as a private person.

Factors that come into play may include departmental policy, whether or not they assert their police authority in the course of their conduct, such as by displaying a badge or gun, announcing themselves as police, or carrying out functions that traditionally have been reserved for law enforcement. Some courts have reasoned that the essential question, and much more important than the display of uniforms or badges, is the nature of the actions that the off-duty officers carry out.

### 3. Off-Duty Arrests

While there are circumstances under which private individuals may make a "citizen's arrest," and while state law in some jurisdictions may provide certain police-like powers to some private security personnel, or give merchants a right to temporarily detain suspected shoplifters and the like for purposes of investigation, making an arrest, especially if accompanied by an assertion of police authority, has historically been a function largely carried out by law enforcement officers.

In <u>Swiecicki v. Delgado</u>, No. 05-4036, 2006 U.S. App. Lexis 23454 (6th Cir.), an off-duty police officer, in full uniform, was found to have acted under color of law while serving as a security guard at a ballpark, and placing patron under arrest after he refused to cease heckling one of the ball players.

The trial court, the appeals court stated, improperly granted qualified immunity to officer, and there were factual issues as to whether he had probable grounds for an arrest, whether the arrest violated the arrestee's free speech rights, and whether the officer used excessive force in ejecting him from the stadium.

The off-duty officer allegedly heard the arrestee using "profane" language, and asked him to either halt his behavior or leave the stadium. When the man did not comply, the officer placed him in the "escort position" and started leading him out of the bleachers.

In the course of leaving the stadium, the officer arrested the man for disorderly conduct and resisting arrest, and wrestled him to the ground. He was subsequently convicted of these charges, but his convictions were overturned on appeal, and he sued the officer for violation of civil rights, including false arrest without probable cause and in violation of his First Amendment rights, and excessive use of force.

A federal appeals court found that the defendant had acted under color of state law during the incident, since he was in full uniform, with badge and weapon, asserted his authority as a police officer, and placed the plaintiff under arrest. It was not disputed that the officer was officially "off-duty" at the time, but the court found that the nature of his actions made it clear that he was acting as a police officer, and not just as a security guard.

The defendant presented himself as a police officer from the beginning of the encounter. There were genuine issues concerning whether the officer had probable cause for the arrest, the court found, including whether the type of heckling that the arrestee had engaged in was protected by the First Amendment at the ballpark.

In another case, <u>Pourghoraishi v. Flying J, Inc.</u>, No. 05-1107, 2006 U.S. App. Lexis 9875 (7th Cir.), a federal appeals court did not determine whether an offduty officer working as a security guard at a gas station acted as security or a police officer in allegedly arresting a truck driver of Iranian national origin for disorderly conduct and trespass, after the gas station prevented him from using a restroom there or paying for his gas, purportedly on the basis of his race or national origin.

During the truck driver's exchange with the manager, an auxiliary Gary, Indiana police officer, employed there at the gas station as a security guard working for a security company, told the truck driver to leave, and he responded that he had to pay for his gas. The off-duty officer/security guard allegedly called him a "motherfucker," handcuffed him, placed him under arrest, and told him that he was going to send him "back to his country."

The security guard took him to a manager's office where he was detained and questioned for a couple of hours. The security guard prepared an arrest report and an offense report on Gary Police Department forms, and charged him with disorderly conduct and criminal trespass. The documents stated that the arrestee was not born in the U.S. and that his race is "Persian." He was taken to the city jail by another officer, and released after posting bond. The arrestee later negotiated a "deferred prosecution" agreement with the prosecutor, under which the charges were dismissed after six months.

The appeals court found that, on the basis of the plaintiff's version of the events, if true, that he did not raise his voice and merely stated that he needed to pay his bill, there would be no probable cause for an arrest for disorderly conduct. Further, paradoxically enough, while the plaintiff testified that the manager told him to leave, the manager's own testimony was that he did not do so, but instead told him that he could <u>not</u> leave until he paid his bill. Based on this, there would also be no basis to arrest the plaintiff for trespass, the court noted.

Without deciding the factual issue of whether the police officer, when he asked the plaintiff to leave, was acting in his capacity as an agent of the gas station or in his capacity as a police officer, the appeals court found, it could not determine whether there was probable cause to arrest him for trespass when he refused to do so. These issues, the court found, were factual ones that had to be resolved by a trier of fact.

In one case, a Texas court found that a city was not liable for off-duty police

officer's alleged use of excessive force in the course of an arrest while employed as a security guard by a private entity, regardless of whether the officer was acting in his official capacity as an officer or in his capacity as a private security guard. If he was acting on behalf of his private employer, the court found, he then acted outside the scope of his employment for the city, whereas if he was acting in his official capacity, the city had governmental immunity under state law since the officer's alleged use of force amounted to intentional conduct which was outside a state statute's waiver of governmental immunity. Morgan v. City of Alvin, No.01-02-01212, 175 S.W.3d 408 (Tex. App. 1st Dist. 2004). See also Schauer v. Morgan, 01-04-00142, 175 S.W.3d 397 (Tex. App. 1st Dist. 2005), ruling that the officer, as a city employee, had immunity from liability in the arrestee's claims against him individually, since the immunity granted to government employees under the Texas Tort Claims Act is not limited to actions carried out within the scope of their employment or in good faith.

When off-duty officers act for purely personal motivations, courts have held that they are not acting as law enforcement. In one such case, off-duty transit police officers were found to have acted completely in their own personal interests in pulling over a motorist after he allegedly damaged their personal car, so that their employer could not be held liable for their alleged false arrest and assault of the motorist, despite the fact that they displayed badges during the incident. They acted in order to make sure that the plaintiff paid for the damage to their car, not to enforce laws against erratic driving. Schilt v. New York City Transit Authority, 2003 NY Slip Op 13202, 759 N.Y.S.2d 10 (A.D. 1st Dept. 2003).

Similarly, in <u>Miller v. Visser</u>, No. 00-CV-9058 (U.S. Dist. Ct., N.D. Okla.), reported in <u>The National Law Journal</u>, p. B2 (July 29, 2002), a city which employed two off-duty officers was not held responsible for their actions based on a finding that they acted on their own.

The two off-duty officers were found liable for \$32 in compensatory damages and \$150,000 in punitive damages for allegedly frightening members of a family by pulling their car over, shouting obscenities at them, and threatening them with guns drawn.

The two officers, a married couple, claimed that they had only stopped the car after someone in it threw something at their vehicle. No damages were awarded against the employing city, as the jury found that the officers acted outside the scope of their employment.

When the motivation in such circumstances is arguably not personal, however,

but law enforcement, an off-duty officer may be found to have acted under color of state law in making an arrest.

One such off-duty police officer was held to have acted under color of law in allegedly falsely arresting at gunpoint and maliciously prosecuting a trucker who claimed he was merely attempting to use a telephone on an emergency basis to provide notification of a highway hazard posed by his broken down vehicle.

A federal appeals court held that the trial judge properly refused to grant the off-duty officer judgment as a matter of law. Whether the off-duty officer threatened the plaintiff with a pistol before or after identifying himself as a police officer, he clearly did identify himself as such by the time he restrained the trucker.

"We have no doubt that when an officer identifies himself as a police officer and uses his service pistol, he acts under color of law." (In that case, however, a defect in jury instructions required a new trial, setting aside \$622,000 award in favor of plaintiff). <u>Jocks v. Tavernier</u>, #00-7735, 316 F.3d 128 (2nd Cir. 2003).

The mere fact that a person is employed by a police agency does not transform actions that they carry out which are of the nature that any private person might perform into law enforcement actions, even if they relate to charging a person with a crime or initiating a prosecution.

An assistant police chief, for instance, did not act "under color of state law" for purposes of a federal civil rights lawsuit when he filled out a form requesting an arrest warrant for the purchasers of his boat, asserting that they had committed embezzlement by failing to make required monthly payments. In doing so, he acted in a purely personal matter, and his actions were the "functional equivalent" of a private citizen making a call for police assistance. Sanchez v. Crump, 184 F. Supp. 2d 649 (E.D. Mich. 2002).

# 4. Some Specimen Policies on Off-Duty Conduct

The following are some specimen policies on off-duty conduct. They are provided as examples only, and any policy developed for a department should be written in close consultation with the department's own legal counsel.

- Charleston, WV, Police Dept. on Off-Duty Powers of Arrest and Firearms Policy
- Colorado Springs, CO, Police Dept. General Order on Off-Duty Enforcement

## **Action**

- Logan Township, NJ, Police Dept. <u>Standard Operating Procedure on Off-Duty Arrests</u>
- National Criminal Justice Institute Model Policy on Off-Duty Police Activity
- Tempe, AZ, Police Dept. Policy on Action While Off Duty

# **AELE Monthly Law Journal**

Bernard J. Farber Civil Liability Law Editor 841 W. Touhy Ave. Park Ridge IL 60068-3351 USA E-mail: bernfarber@aol.com Tel. 1-800-763-2802

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