

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

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Opinion No. 02-002

Governmental Liability for Off-Duty Police Officers Working for Private Security Firms

QUESTIONS

1. If a law enforcement officer, working for a properly licensed, private security company during off-duty hours, uses government-issued or government-purchased equipment, can the government be held liable for the officer's acts while working off-duty?
2. Is an officer working off-duty considered merely a security officer or a law enforcement officer with full arrest powers?
3. When an officer is off-duty, what are his or her official duties?
4. If an off-duty officer uses government-issued equipment, and he or she is covered by the private security company's liability insurance, who is responsible for the officer's actions?
5. When an off-duty officer is working for a private security company, is he or she still a law enforcement officer or simply an employee of the private security company?
6. If the private security company for whom the off-duty officer is working pays the government/department that regularly employs the officer, and the government/department then pays the officer, who is responsible for officer's acts?

OPINIONS

1. Yes. The Tennessee Supreme Court has stated that under Tennessee agency law, the government may be liable, along with a private security company, for the acts of an off-duty police officer.
2. An off-duty police officer maintains his or her full arrest powers.

3. A police officer is not under a general duty to enforce the law while off-duty, but the officer may assume his or her regular duties to enforce the law and remedy breaches of the peace.
4. If an off-duty police officer is covered by the private security company's liability insurance, the government may still be liable for the officer's acts.
5. While working off-duty, a police officer is primarily considered an employee of the security company. However, he or she still has full police power.
6. If the security company pays the government/department who regularly employs the officer, and the government then pays the officer for his off-duty work, the private company and the government may both be liable for the acts of the off-duty officer. Such a situation increases the chances of government liability.

ANALYSIS

1. In *White v. Revco Discount Drug Centers, Inc.*, 33 S.W.3d 713 (Tenn. 2000), the Tennessee Supreme Court decided that a private company who employs an off-duty police officer as a security guard may be liable for the officer's acts. The Court held that traditional agency law governs the relationship between an off-duty police officer and the private employer. *White*, 33 S.W.3d at 723. Thus, the private employer is liable for the off-duty officer's acts if (1) the officer acted within the scope of employment, *or* (2) the employer directed or commanded the officer's acts outside the scope of employment, *or* (3) the officer acted with the consent or ratification of the employer and intended to benefit the employer. *Id.* at 724.

Though *White* did not directly address the issue of governmental liability, the Supreme Court stated that an off-duty officer may be the agent of both the private employer and the governmental entity that regularly employs the officer. *Id.* Consequently, under the "dual master" doctrine, the government is liable for the off-duty acts of a law enforcement officer if (1) the action taken by the officer is an exercise of a traditional police power, such as the power to arrest, the power to issue a citation, or the power to command aid; (2) the municipality had knowledge, either actual or constructive, of the officer's action; (3) the action taken by the officer simultaneously serves the interests of both the private employer and the municipality; *and* (4) the interests of the private employer and the municipality that are served by the officer's actions are not inconsistent with each other. *Id.* at 725. The Supreme Court made clear that all four of these elements must be shown in order to hold the government liable for the off-duty officer's acts.

To date, no authority has stated that the officer's use of government-owned equipment will increase or decrease the likelihood of governmental liability. Therefore, it is unlikely that the use of government-owned equipment is a deciding factor. That is not to say that the use of government-owned equipment is insignificant; inasmuch as it applies to any of the four factors listed in *White*, the use of government-owned

equipment may serve to buttress the plaintiff's case that the officer was acting as an agent for the government as well as the private employer. If the four factors listed in *White* are shown, the government will be liable pursuant to the terms of the Governmental Tort Liability Act, codified in Tennessee Code Annotated §§ 29-20-101 to 29-20-407 (2000).

Prior to *White*, the Tennessee Supreme Court in *Ezell v. Cockrell*, 902 S.W.2d 394 (Tenn. 1995), decided that Tennessee's Governmental Tort Liability Act did not abolish the public duty doctrine, which holds that the government is not liable for an employee's breach of a duty that is owed to the public at large, such as the duty to arrest criminal suspects or the duty to fight fires. *Ezell*, 902 S.W.2d at 397, 400. To the extent that a governmental entity is sued for an off-duty officer's failure to perform a duty that he or she owes to the public at large, the public duty doctrine would bar governmental liability in most circumstances. *See Ezell*, 902 S.W.2d at 400-01; *Hurd v. Woolfork*, 959 S.W.2d 578, 581-82 (Tenn. Ct. App. 1997).

2. In Tennessee, police officers have the "full panoply of 'official' police power, even when they are off-duty." *White*, 33 S.W.3d at 720. This presumably includes the power to make an arrest, since even a private person is able to make an arrest in certain circumstances. *See* Tenn. Code Ann. §§ 40-7-101 and 40-7-109 (1997). In addition, police officers are authorized to make arrests without warrants when crimes are committed in their presence. Tenn. Code Ann. § 40-7-103 (Supp. 2000). In *White*, the Supreme Court noted that the ability of police officers to exercise official police power while off-duty was a considerable advantage to hiring officers as security guards. *White*, 33 S.W.3d at 720.

3. Police officers are not under a general duty to enforce the law while they are off-duty. *See id.*; *Ezell*, 902 S.W.2d at 403. The Supreme Court expressly reaffirmed this holding in an opinion denying a petition to rehear in the *White* case. *See White v. Revco Discount Drug Centers, Inc.*, 37 S.W.2d 885, 885 (Tenn. 2000). An off-duty police officer, however, may assume his or her regular duty to enforce the law and remedy breaches of the peace, and the municipality may summon the officer to perform official duties. *White*, 33 S.W.3d at 721.

4. In *White*, the Supreme Court made clear that the issues of private employer liability and municipal liability for off-duty officers were governed by agency law. *Id.* at 723. Under *White*, the private employer *and* the government may both be liable for the acts of the officer. *Id.* at 725. The private employer will be liable if there is a principal-agent relationship between it and the officer. The governmental entity will be liable under the dual master doctrine if the four elements listed in *White* are shown. The fact that the private employer has liability insurance to cover the officer's acts is irrelevant to who is liable.

5. Because a police officer is not under a continuous duty to enforce the law while off-duty, the officer is primarily an employee of the private security company while he or she is working off-duty. Of course, as noted above, the off-duty officer may assume official duties and exercise full police power while off-duty.

6. If the security company pays the governmental entity that regularly employs the officer, and the governmental entity then pays the officer for his off-duty work, the governmental entity would be liable for the officer's acts if the four elements listed in *White* are shown. Such a scenario may be relevant to whether the government had knowledge of the officer's acts and the ability to control them. *See White*, 33 S.W.3d at 725, n. 14. The private employer would also be liable if a principal-agent relationship exists between it and the officer. *See id.* at 723-24.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

GILL ROBERT GELDREICH
Assistant Attorney General

Requested by:

The Honorable Ben West, Jr.
State Representative
60th Legislative District
Suite 37, Legislative Plaza
Nashville, Tennessee 37243-0160