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### The New Hired Guns: Who Should Be Liable for the Conduct of Off-Duty Law Enforcement Officers Employed As Private Security Officers

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**The New Hired Guns:  
Who Should Be Liable For  
The Conduct of Off-Duty Law Enforcement Officers  
Employed As Private Security Officers**

by  
**Fermin De La Torre**

**Introduction**

According to the Department of Justice, since 1993 the violent crime rate in the United States continually declined until early 2005, when it increased slightly.<sup>1</sup> Yet, the continuing media sensualization of crime and the terrorist attacks of September 11, 2001 have fueled the perception that crime is more rampant than ever. Given the continual media bombardment of crime reporting with “all news all the time” television channels, Court TV, reality crime shows such as COPS, network news magazine programs, and electronic news sources on the Internet, this perception is extremely difficult to overcome. According to a recent report, as opposed to their own personal experience, “76% of people get their understanding of crime from the news media,” and 80% of the respondents in another poll admitted “that violent crime media coverage increased their fear of crime and personal victimization.”<sup>2</sup>

As a consequence of sensualized crime reporting and an increasing fear of crime, government agencies and private businesses have resorted to a growing use of security measures in hopes of reducing the public’s fear and assuring its safety. Today, security measures such as closed circuit television systems, monitored alarm systems, and private security forces are commonplace and expected by most citizens. This expectation of constant safety and security

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<sup>1</sup> <http://www.ojp.usdoj.gov/bjs/glance/viort.htm> (Violent Crime Chart; violent crimes included are rape, robbery, aggravated and simple assault, and homicide) (last visited December 17, 2006).

<sup>2</sup> Central Missouri State University Department Of Criminal Justice *Journal of the Institute of Justice & International Studies* “Papers from the November 2002 Crime, Media, & Public Policy Symposium” Number 2, 2003, at iv (available at <http://www.cmsu.edu/cjinst/journal1103.pdf>) (last visited December 17, 2006).

has led to a growing demand for off-duty law enforcement officers to perform private security functions, since law enforcement officers are generally considered to have better training, superior equipment, greater investigative resources, and broader legal authority to respond to situations. Consequently, municipalities are allowing, and sometimes encouraging, the off duty employment of their officers as private security guards, essentially making them the today's hired guns.

To understand these new hired guns, it is important to revisit the history of the wild, untamed, American West, and a time when safety and security were often found at the end of a gun barrel. Our thoughts of the Old West often invoke images of gunfighters who sold their skills to the highest bidder for protection or revenge. It is no secret that in the days of the Old West a man could easily leave behind his shady past as gunslinger and become a lawman. Accordingly, the local citizenry of a community often purchased the skills of gunfighters in effort to bring law and order to their communities. By many accounts, this was the case in October 1880 when the Town of Tombstone, Arizona hired Virgil Earp as the town marshal.<sup>3</sup>

In the ensuing year, Virgil Earp and his two brothers, whom Virgil had appointed in an effort to support him, created many enemies; thus, for many people, the events of October 26, 1881 came as no surprise.<sup>4</sup> On that October day, Virgil Earp, his two brothers, and their friend Doc Holliday set out to arrest a group of cowboys that had allegedly threaten to kill Earp and his companions. In a classic "arrest gone bad" scenario, the encounter with the cowboys ended in the infamous "gunfight at the O.K. Corral."

In the aftermath of the shooting, Wyatt Earp and Doc Holliday were charged with murder, but were ultimately released when the judge of the inquest into the shootout determined

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<sup>3</sup> <http://www.spartacus.schoolnet.co.uk/WWokcorral.htm> (last visited December 17, 2006).

<sup>4</sup> Id.

that there was insufficient evidence for the men to stand trial.<sup>5</sup> Following the hearing, Old West justice began to play out at the end of the gun when Morgan Earp was murdered, and an attempt was made on the life of Virgil Earp.<sup>6</sup> In response, Wyatt Earp and Doc Holliday proceeded to distribute justice in their own personal fashion to those allegedly involved in the murder of Morgan Earp and the attempted murder of Virgil.<sup>7</sup>

Unlike the Earps, today's new hired guns are not offering their special skills to bring law and order to a town; instead they work for private employers as private security officers. Today's new hired guns are usually employed as law enforcement officers, and their skills are marketed by the vary agencies that employ them. Furthermore, while liability was of little concern in the Old West, the liability of the new hired gun, his private employer, and his employing municipality vary from one jurisdiction to another and are dependant on the circumstances surrounding the officer's off-duty conduct.

This article examines the benefits received by municipalities that market the off-duty services of their officers, the benefits received by the employers hiring off-duty law enforcement officers, and the current legal standards regarding liability for the conduct of off-duty officers while employed as private security officers. Finally, this article will argue that the dual master doctrine is the proper standard by which liability should be allocated in cases involving the conduct of these off-duty law enforcement personnel.

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<sup>5</sup> Jane Matson Lee Et. al, H. F. Sills, Mystery Man of the O. K. Corral Shootout at 1 (Virgil Earp was still recovering from wounds sustain in the gunfight) (available at <http://home.earthlink.net/~knuthco1/recent/Sills.pdf>) (on file with author) (last visited December 18, 2006).

<sup>6</sup> Transcript, History Detectives Episode 7, 2005: Doc Holliday Watch Tulsa, Oklahoma (available at [http://www.pbs.org/opb/historydetectives/pdf/307\\_holliday.pdf](http://www.pbs.org/opb/historydetectives/pdf/307_holliday.pdf)) (last visited December 18, 2006).

<sup>7</sup> Id.

## **Benefits Received by the Municipalities**

Today, many of the municipalities and agencies that provide law enforcement services, either expressly or implicitly, market the use of their off-duty officers to private entities for private security roles.<sup>8</sup> For example, consider the following from the City of Durham, North Carolina Police Department website which exalts the benefits of hiring an off-duty Durham Police Officer. According to the Durham Police Department you get a “State-certified, experienced, and fully trained Law Enforcement (LE) Officer” that can “Enforce North Carolina State Laws and Durham City Ordinances,” while wearing his departmental uniform and issued equipment.<sup>9</sup> Furthermore, “on some occasions, a Police Department vehicle may be available for the off-duty officer’s use.”<sup>10</sup> The department also stresses that there is limited worker’s compensation and civil liability coverage for off-duty officers when “the incident or injury is directly related to the arrest of subject for a violation of criminal law or the officer is engaged in another duty that is unique to the law enforcement profession.”<sup>11</sup>

A simple Google Search of the Internet shows that the Durham Police Department is not the only municipality offering the services of its’ officers to the public. The websites of the Clay County, Florida Sheriff’s Office;<sup>12</sup> the Sacramento County, California Sheriff’s Department,<sup>13</sup> and the City of Clearwater, Florida Police Department<sup>14</sup>, all provide information on hiring off-

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<sup>8</sup> For purpose of this article off-duty employment includes departmentally managed, sanctioned, and authorized employment. Departmentally managed overtime requires that all overtime assignments be coordinated through the designated office within the department. Sanctioned means the department allows officer to work off-duty with little restrictions. Authorized means the officer off-duty job must be approved by the department, and is regulated by policy.

<sup>9</sup> [http://www.durhampolice.com/off\\_duty/](http://www.durhampolice.com/off_duty/) (last visited December 18, 2006).

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> [http://www.claysheriff.com/02\\_13\\_00OffDuty.asp](http://www.claysheriff.com/02_13_00OffDuty.asp) (last visited December 18, 2006).

<sup>13</sup> [http://www.sacsheriff.com/organization/investigative\\_&\\_regional\\_services/off\\_duty\\_program/index.cfm](http://www.sacsheriff.com/organization/investigative_&_regional_services/off_duty_program/index.cfm) (last visited December 18, 2006).

<sup>14</sup> <http://www.clearwaterpolice.org/patrol/offduty.asp> (last visited December 18, 2006).

duty officers. These websites are only a small sample of the law enforcement agencies marketing the services of their officers.

These departments are not simply allowing the use of their officers as a public service for the public good; there are several self-serving interests for municipalities to market the services of their officers. First, by allowing off-duty employment, departments can sidestep the Fair Labor Standard Act of 1938 (FLSA)<sup>15</sup> by encouraging officers to work additional hours which are not subject to the FLSA because the private party either pays for the services directly to the officer or through a third party acting for the officer, such as a local police association. Second, even if the additional hours worked are compensable under the FLSA, the additional overtime expenses incurred are often offset by the fees charged for the off-duty officers' services.

For some municipalities the benefits of off-duty employment are so great that off-duty employment is often regulated by city ordinance in order to prevent the use of private security officers at public facilities.<sup>16</sup> Thus, creating a monopoly that ensures off-duty employment remains available as an incentive in recruiting and retaining officers. Such monopolies only serve to further entrench off-duty employment in the law enforcement culture as a benefit to which officers are entitled because of their low pay and family sacrifice. For example, the starting salary for a police officer at one major state university is approximately \$21,000 annually, but an officer can easily double or triple his income by working additional off-duty employment assignments secured through the department.<sup>17</sup> In fact, since each off-duty assignment requires

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<sup>15</sup> Fair Labor Standards Act (referred to as FLSA) (29 U.S.C. §§ 201 et seq.) (2006).

<sup>16</sup> Sec. 25-8. Surcharge for off-duty police officer. (Ord. No. 86614, § 8, 9-11-97) City of San Antonio Texas Municipal Code (available at <http://www.municode.com/Resources/gateway.asp?pid=11508&sid=43>) (last visited December 17, 2006).

<sup>17</sup> Interview with Sargent Vince Busico of the University of Tennessee Police Department (November 30, 2006) (salary information also available at <http://web.utk.edu/~utpolice/employment.html>) (last visited January 9, 2007).

fewer supervisors than officers, some officers have foregone promotion because it would amount to a pay cut for them.<sup>18</sup>

Law enforcement's cultural attitude regarding off-duty employment is best summarized by a statement from a Texas officer in a recent newspaper interview. Regarding off-duty employment, the officer stated, "[t]he department pays my bills," but "the extra jobs allow me to put my kids in nicer schools and to provide things for my family that my base salary wouldn't necessarily allow me to do."<sup>19</sup> This officer is not alone in his thinking, as an estimated "80 percent of officers [in the Dallas Police Department] regularly moonlight at off-duty jobs,"<sup>20</sup> and nationwide an estimated "more than half of the officers in many metropolitan police departments now supplement their income with private security work."<sup>21</sup>

The importance of secondary employment to law enforcement officers is evident by the language contained in one state's statute listing the general rights of law enforcement officers within the state. The statute warns: "A law enforcement agency: (1) may not prohibit secondary employment by law enforcement officers; but (2) may adopt reasonable regulations that relate to secondary employment by law enforcement officers."<sup>22</sup>

As a result of law enforcement officers embracing off-duty employment as a fundamental right, to the extent that in some states it is statutorily protected, agencies are able to entice officers with off-duty employment opportunities to earn extra income. In addition, since off-duty employment incurs minimal, if any, cost to municipalities, they are able to maintain low salaries for officers and still retain them.

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<sup>18</sup> Id.

<sup>19</sup> Tanya Eiserer, City Audit Critical of Off-Duty Police Work Dallas: Report Cites Confusing Rules, Lack of Monitoring, The Dallas Morning News, September 5, 2005, at 1B.

<sup>20</sup> Id.

<sup>21</sup> David A. Sklansky The Private Police, 46 UCLA L. Rev. 1165, 1176 (April 1999).

<sup>22</sup> Md. Code Ann. [Public Safety] § 3-103 (2006).

Moreover, if a department manages the off-duty employment of its officers, it can benefit from the administrative fee for these services, in addition to any earnings above the cost of the services provided. Recently, the City of Pittsburgh, Pennsylvania Police Department estimated that with annual administrative costs of approximately \$150,000, the city could bring in between \$500,000 and \$1 million a year by administering the off-duty employment of its officers.<sup>23</sup>

Lastly, there is the public policy argument that allowing officers to work off-duty deters crime by providing an increased uniformed officer presence in public. While there may be anecdotal evidence to support this contention, it is difficult to prove that the crime rate is lowered more by a uniformed law enforcement officer standing in a store than by an armed security guard standing in the same spot. Moreover, consider the fact that the Tennessee Supreme Court recently held that an officer is under no statutory duty to enforce the law while off-duty.<sup>24</sup> Thus, an off-duty officer working security at restaurant that serves alcohol could provide an intoxicated patron a cab ride home instead of arresting him for public intoxication. As a result, the customer will return to the establishment where he can drink excessively with no fear of repercussions, benefiting the restaurant more than the public by the officer's presence and actions.

However, this is not the case in Texas, where the state Court of Appeals held that all law enforcement officers have a duty to "preserve the peace," even when off-duty<sup>25</sup>. In the case before the court, an off-duty police officer working security, not in uniform, for an apartment complex discovered a person hiding behind an air conditioning unit with his penis exposed. Although the court acknowledged that any citizen could have arrested the person, the court made it clear that law enforcement officers have a duty to preserve the public peace. Thus, any person

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<sup>23</sup>Jonathan D. Silver, City May Take Over Off-Duty Officer Duties; City Could Reap More than \$500,000 By Assigning Police Details, Pittsburgh Post-Gazette, December 10, 2005, at A-1.

<sup>24</sup>White v. Revco Disc. Drug Ctr., Inc., 37 S.W.3d 885 (Tenn. 2001) (petition denying rehearing).

<sup>25</sup>Mansfield v. C.F. Bent Tree Apartment L.P., 37 S.W.3d 145, 151 (Tex. App. 2001).



in a situation like that of the suspect “could expect to be arrested if discovered by any police officer, whether on-duty or off.”<sup>26</sup> As the actual statutory duty imposed upon off-duty officers to enforce laws varies from one jurisdiction to another, these cases are illustrative of one flaw of the public policy argument; Americans are not receiving the same level of protection across the nation because there are no uniform standards regarding the off-duty authority of law enforcement officers.

Another weakness in the public policy argument is, like the hired guns of the Old West, that the services of off-duty officers generally go only to those who can afford to pay for them. Hence, it is doubtful that the overall public welfare is advanced by providing off-duty law enforcement officers to wealthy members of the public and prosperous businesses.

Still, most agencies will argue that it is the officers and the public who benefit most from the off-duty employment of law enforcement officers. However, as the facts suggest, there is an argument that the municipalities benefit just as much as, if not more than, either the public or the officers themselves. If the benefits to municipalities were as minimal as some municipalities seem to suggest, there would be little need for them to market their officers to employers and to encourage or monopolize off-duty employment opportunities for their officers.

### **Benefits Received by the Employers**

According to a recent government report “in 2003, there were approximately one million security guards (including airport screeners) employed in the United States — compared to 650,000 U.S. police officers.”<sup>27</sup> While private security officers outnumber law enforcement officers almost two to one, starting wages for private security officers vary dramatically, ranging

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<sup>26</sup> Id.

<sup>27</sup> Paul W. Parfomak, Science and Technology Resources, Science, and Industry Division, Congressional Research Service The Library of Congress Guarding America: Security Guards and U.S. Critical Infrastructure Protection, at 1 (November 12, 2004) (available at <http://fas.org/sgp/crs/RL32670.pdf>) (last visited December 18, 2006).

from minimum wage in some areas to \$9 an hour or more in many metropolitan areas.<sup>28</sup> Some factors effecting the private security guards earnings include experience, the specific posting (e.g., construction site or office building), geographical region, employer, and various other considerations.

In addition to pay differentials, private security companies vary greatly as to the employee benefits they provide. Even at the government level, pay and benefits are limited. For example, an unarmed security officer working at one major state university starts at seven dollars an hour, is provided no benefits, and, generally, is limited to a maximum of thirty-two hours per week.<sup>29</sup> Given the low wages, lack of training, and limited authority, it should come as no surprise that the national turnover rate among private security guards is significant, as “high as 70 percent, meaning that 70 percent of security guards leave a specific employer within a year of starting.”<sup>30</sup> Yet even with high turnover, lack of training, and limited authority, the United States Congress in enacting the Private Security Officer Employment Authorization Act of 2004 (PSOEAA)<sup>31</sup> found:

The threat of additional terrorist attacks requires cooperation between public and private sectors and demands professional, reliable, and responsible security officers for the protection of people, facilities and institutions; . . . the American public deserves the employment of qualified, well-trained private security personnel as an adjunct to sworn law enforcement officers; and private security officers and applicants for private security officer positions should be thoroughly screened and trained.<sup>32</sup>

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<sup>28</sup> Colorado Department of Regulatory Agencies Office of Policy, Research and Regulatory Reform, Private Security Companies and Private Security Guards at 19 (March 31, 2006 ) (available at <http://www.dora.state.co.us/OPR/archive/2006privatesecuritycompaniesandguards.pdf> ) (noting that private security guard in Colorado earn between \$9 and \$12) (last visited December 18, 2006).

<sup>29</sup> See *supra* note 17 (referred to as Community Service Officers) (additional information available at <http://web.utk.edu/~utpolice/security.html>) (last visited December 18, 2006).

<sup>30</sup> *Id.* at 19.

<sup>31</sup> Pub. L. 108-458 § 6402, codified as a note to 28 U.S.C. § 534.

<sup>32</sup> Pub. L. 108-458 § 6402(b)(5), (7) – (9).

While the enactment of the PSOEAA seems to imply that Congress was setting nationwide standards for the employment and training of private security officers, in reality the Act does nothing more than permit the collection of a fee and it allows, but does not require, “authorized employers” of security guards to submit fingerprints to the Federal Bureau of Investigation for purposes of conducting a nationwide criminal history background check. Furthermore, the PSOEAA does not prohibit an employer from hiring a person with a criminal history; instead, it defers to state law and the employer to determine the proper course of action for dealing with the applicant.

Given the narrow focus of the Act and its failure to establish national training standards, the variation in training between law enforcement and private security officers continues to grow. Consequently, off-duty law enforcement officers have considerable advantage in seeking off-duty private employment.

Consider the vast differences in training requirements that exist across the United States. “Only four states require both pre- and post-licensure training. . . . General training requirements for unarmed security guards vary between 4 and 40 hours. For armed security guards, the additional training requirements vary between 4 and 47 hours.”<sup>33</sup> Moreover, in order to become an armed security officer in Tennessee, a person must receive a minimum of sixteen hours of training;<sup>34</sup> in contrast, California requires forty hours of training.<sup>35</sup>

While private security officer training is measured in hours, law enforcement officer training is measured in weeks. Some municipalities require as much as twenty-four weeks of training followed by a one year probationary period. Furthermore, some specialized training courses, such as those in homeland security, are reserved exclusively for law enforcement

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<sup>33</sup> See *supra* note 28, at 19.

<sup>34</sup> Tenn. Code Ann. § 62-35-118 (2005).

<sup>35</sup> Cal Bus & Prof Code § 7583.6 (b) (2006).

officers due to the sensitive nature of the information provided. As the Tennessee Supreme Court has recognized “the advantages of hiring off-duty officers include their training in law-enforcement practices and their ability to perform some duties that ordinary citizens cannot.”<sup>36</sup>

In addition to the extensive training, there are many resources available to law enforcement officers to which private security officers do not have access. For example, the Federal Bureau of Investigation’s (FBI) National Crime Information Center (NCIC) databases, which include nationwide wanted records, criminal histories, and nationwide vehicle registration information accessibility, are available only — with the exception of criminal history background checks by employers of private security officers — to law enforcement agencies and their officers. The same is true for the databases of the Drug Enforcement Administration (DEA), El Paso Intelligence Center (EPIC), or the U.S. Customs and Border Protection’s Operation Blue Lighting Center, which maintain information on border crossings, drug trafficking intelligence, and highway interdiction seizures.

In fact, federal law prohibits any information received through the NCIC to be provided to anyone other than a law enforcement officer.<sup>37</sup> Thus, an off-duty officer, by virtue of his position, could request and receive information, such as vehicle registration information or a nationwide wanted check, which a private security officer would never be authorized to receive.

The resources available to a law enforcement officer are not limited to database information. An off-duty law enforcement officer can readily request assistance from his on-duty brethren to aid him in his off-duty position by contacting the dispatch center or calling other

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<sup>36</sup> White v. Revco Discount Drug Ctrs., Inc., 33 S.W.3d 713, 716-18 (Tenn. 2000).

<sup>37</sup> 28 CFR 20.33(b) (2006) (“The exchange of criminal history record information authorized by paragraph (a) of this section is subject to cancellation if dissemination is made outside the receiving departments, related agencies, or service providers identified in paragraphs (a)(6) and (a)(7) of this section.”) (cancellation means the agency will not be allowed to access the National Crime Information Center’s databases); See also 28 USC § 534(b) (2006) (“The exchange of records and information authorized by subsection (a)(4) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies.”).

on-duty officers directly on their cell phones. Such is the nature of the law enforcement culture.<sup>38</sup>

Employers also benefit from the arrest authority granted to off-duty officers by virtue of their position, thereby making off-duty law enforcement officers even more attractive to employers. This fact did not escape the attention of the Tennessee Supreme Court in a recent case when it was noted that “police officers in Tennessee still possess the full panoply of ‘official’ police power, even when they are off duty. Indeed, this benefit is one of the considerable advantages of employing off-duty officers as private security guards.”<sup>39</sup>

Conversely, the enforcement authority granted to private security officers nationwide is as varied as the employment and training requirements experienced by these officers, and lacks similar governmental guidance. A recent report to Congress noted that: “Although security guards have long supplemented public law enforcement, they typically have more limited authorities than police and other law officers,” and while specific enforcement powers vary by jurisdiction, “they generally correspond to the police authorities of private citizens.”<sup>40</sup>

In summarizing the arrest authority available nationwide to private security officers, it has been noted that “[i]n most states, citizens may make arrests only when a crime is committed in their presence; suspicion that a crime has taken place is not enough.”<sup>41</sup> Furthermore, while “in some states, citizens may only make arrests for felonies,”<sup>42</sup> the suspect must be immediately turned over to over to police custody. As a result of their limited arrest authority, “civilians who accidentally take innocent suspects into custody are liable for false arrest.”<sup>43</sup>

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<sup>38</sup> See *supra* note 36, at 722.

<sup>39</sup> *Id.* at 720.

<sup>40</sup> See *supra* note 27, at 4.

<sup>41</sup> See *supra* note 36, at 716-18.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

The Supreme Court of Tennessee, in discussing the arrest authority available to private security officers, noted that “police officers in Tennessee do not possess the exclusive authority to make arrests, as private citizens possess this power in many of the same circumstances as officers on official duty.”<sup>44</sup> Furthermore, the court noted that security officers in Tennessee are authorized by statute to “enforce rules, regulations or local or state laws on private property.”<sup>45</sup> However, the authority granted to private security officers in Tennessee may not be as broad as the court’s opinion would have led one to believe.

Two recent Tennessee Attorney General Opinions provide a narrower interpretation of a private security officer’s authority. For example, regarding the enforcement of traffic laws on private property, the Attorney General opined that “private security guards are only authorized to control, direct or regulate traffic on private roads.”<sup>46</sup> Similarly, in another opinion discussing the authority of a security guard to detain a suspect for questioning without the suspect’s consent, as a law enforcement officer is authorized to do, the Tennessee Attorney General wrote that “no authority permits security guards to conduct investigatory stops merely to question a suspect . . . a security guard may not force a suspect to remain subjected to questioning against his or her will. Any detention against the suspect’s will would be unlawful.”<sup>47</sup>

In addition to legislative or interpretive restrictions on their enforcement authority, private security officers may face further limitations to their power by virtue of state licensing regulations. For example, consider the following restrictions found in California’s security guard training manual: “A security guard should never touch a criminal suspect except for self defense, or when necessary to use reasonable force in an arrest,” and “[i]f a security guard believes an

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<sup>44</sup> Tenn. Code Ann. § 40-7-109 (2005) (listing grounds permitting arrest by private citizens).

<sup>45</sup> Tenn. Code Ann. § 62-35-102(16)(2005).

<sup>46</sup> 2003 Tenn. AG LEXIS 107 (Tenn. AG 2003).

<sup>47</sup> 2004 Tenn. AG LEXIS 4, 2-3 (Tenn. AG 2004) (internal citation omitted).

arrested person is armed, the guard may search for weapons only. A suspect may not be legally searched for weapons unless he is actually arrested.”<sup>48</sup> The inconsistency between statutory, court interpreted, and regulatory enforcement authorities granted to private security officers only further serves to make the employment of off-duty law enforcement officers as private security officers a practical choice for businesses and individuals. Additionally, private employers of off-duty law enforcement officers benefit from the lower turnover in law enforcement agencies, the greater training provided to law enforcement officers, and the unique resources available to them as officers.

### **Summary of Benefits**

In today’s environment of continuing fear of crime and terrorism, the public demands increased security to ensure its safety throughout the day. Additionally, local, state and federal governments seek increased security for protection of the nation’s various infrastructures and necessary facilities. As a result of these increasing internal security demands, Congress recognized the need for “cooperation between public and private sectors” to ensure “professional, reliable, and responsible security officers for the protection of people, facilities, and institutions,” and subsequently enacted the PSOEAA.<sup>49</sup> Yet, the failure of Congress to establish national employment and training standards for private security, continuing nationwide inconsistency regarding the enforcement authority of private security officers, and the security industries’ inability to control high turnover rates, only serve to increase the interest in and the benefits of employing off-duty law officers as private security officers. Other factors enhancing the employment of off-duty law enforcement officers as private security officers are the

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<sup>48</sup> State of California, Bureau of Security and Investigative Services, Power to Arrest Training Manual, at 7-9 (November 2005) (available at <http://www.dca.ca.gov/bsis/publications/poa.pdf>) (last visited December 18, 2006).

<sup>49</sup> See supra note 30.

continuing marketing of their services by their agencies, relaxed departmental regulations regarding off-duty employment, and exclusiveness of specialized training.

Thus, as the private employment of off-duty law enforcement officers continues, litigation concerning the off-duty actions of officers working private security jobs is inevitable. While traditionally an employer is generally liable for the actions of his employees, the use of off-duty law enforcement officers in a private capacity creates problems in determining liability because these officers are also government employees. Accordingly, the resulting issue for courts is whether the actions of an off-duty officer imputes liability on his private employer, employing municipality, himself, or any combination of the parties involved. In order to answer the question of liability, courts across the nation have developed various standards for determining liability for the conduct of off-duty law enforcement officers working in private security. The result is a lack of uniformity across the United States.

## **The Current Legal Standards**

### **State Level Standards**

In general, under the principle of *respondeat superior*, an employer (Master) is vicariously liable for the actions of an employee (Servant), so long as the employee is not an independent contractor, and tortious conduct occurs within the scope of his employment.<sup>50</sup> For the purpose of this discussion, it will be assumed that an off-duty law enforcement officer working as a private security officer is not an independent contractor; thus, the next issue is determining whether his actions were in the scope of his employment.<sup>51</sup>

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<sup>50</sup> Vincent R. Johnson, *Mastering Torts 2<sup>nd</sup> ed. A Student's Guide to the Law of Torts* 171 (1999).

<sup>51</sup> According to the Restatement (Second) of Agency § 228: (1) Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.



At first, it would appear the application of the principle of *respondeat superior* is proper in cases involving the actions of an off-duty law enforcement officer employed as private security officer. However, many courts are unwilling to apply such a strict liability standard on employers. As the Tennessee Supreme Court has noted:

We recognize that issues stemming from the private employment of off-duty officers do not fit precisely within the typical framework of respondeat superior. This incongruity arises largely because the special status of peace officers in this state permits an off-duty officer to act within the scope of his or her public employment, even while otherwise performing duties for the private employer.<sup>52</sup>

To illustrate the court's concern consider the following example: an apartment complex hires an off-duty officer to act as a courtesy officer<sup>53</sup> in exchange for a rent free apartment, a relationship that is encouraged by some law enforcement agencies.<sup>54</sup> The officer may be assigned a variety of tasks such responding to after hour calls of loud music. While departmental rules regarding the restrictions placed on off-duty officers vary from jurisdiction to jurisdiction, for the purpose of this example, it is assumed the officer in question is allowed to take enforcement action if necessary while off-duty.

On the night in question, Officer Example is off-duty and at his apartment in civilian clothing. While relaxing he receives a page from the apartment complex's answering service and calls them immediately. The answering service reports that a neighbor is complaining about loud music coming from a particular apartment. When he arrives at the apartment in question the officer detects a strong chemical odor being emitted from the apartment. The officer knocks,

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<sup>52</sup> See *supra* note 38, at 718.

<sup>53</sup> In essence employed as a private security officer.

<sup>54</sup> [http://www.cityofcentral.org/town\\_hall/police/courtesy\\_officer\\_program.shtml](http://www.cityofcentral.org/town_hall/police/courtesy_officer_program.shtml) (last visited December 18, 2006) (stating "This Department recognizes that a having a sworn certified officer as a resident of the Town of Central is beneficial to the safety and security of the apartment complex where the officer resides. . . ."); <http://www.greensboro-nc.gov/Departments/Police/Citizens/courtesyofficer.htm> (last visited December 18, 2006) (stating "The Courtesy Officer Program allows police personnel who reside in multi-family communities to receive reductions in rent in exchange for non-law enforcement services. Courtesy Officers are encouraged to interact with residents in their communities and assist the apartment managerial staff as necessary. . . .").

but there is no response because of the loud music. The officer tries to open the door and finds it unlocked. The officer enters the apartment and realizes that he has walked into an active clandestine methamphetamine laboratory. At the same time the officer realizes the situation, the armed occupant of the apartment realizes the presence of the officer. The occupant fires his weapon at the officer, and the officer returns fire. The occupant is killed in the exchange of gunfire and a stray bullet passing through a wall injures a neighbor, causing paralysis of his right arm.

Although the Tennessee Supreme Court might contend that such a case would be outside of the scope of the principle of *respondeat superior*, the facts indicate the contrary. As noted previously, the primary question under the principle of *respondeat superior* is whether the officer was acting within the scope of his employment at the time of the incident, which must be determined by examining the factors Restatement (Second) of Agency § 238.<sup>55</sup> Therein lies the problem. A party could argue that the response to the initial loud call was clearly within his scope of employment for the apartment complex. The call occurred within the authorized time and space limits, and the shooting was actuated, at least in part, by a purpose to serve the master. As to whether the force intentionally used by the servant against another is not foreseeable by the master, it would seem illogical for the employer of an armed law enforcement officer not to expect the possible use of deadly force by the officer. Thus, when the above example is analyzed using the principle of *respondeat superior* and the factors stated in the Restatement (Second) of Agency § 238 regarding the scope of employment, the conclusion would be that the apartment complex is liable for the officer's actions.

Conversely, the apartment complex could argue that the officer was outside of his scope of employment once he smelled the strong chemical odor and entered an unknown environment

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<sup>55</sup> Restatement of Law (Second) Agency § 228 (1958).

instead of calling the fire department. Still, it would appear the principle of *respondeat superior* is applicable in cases of off-duty law enforcement officers working as private security officers, and ultimately the issue of liability should be a question left for the trier of fact.

However, a majority of courts, including those in Tennessee, seem unwilling to impose such strict liability on the employers of off-duty law enforcement officers. As the Tennessee Supreme Court noted, jurisdictions that have examined the issue of employer liability “are divided as to whether, and under what circumstances, a private employer may be held liable for the actions of an off-duty officer employed as a security guard.”<sup>56</sup>

This division among jurisdictions has led to three basic standards for determining the liability of private employers utilizing off-duty law enforcement officers in the role of private security officers. First, there is the standard used by the majority of jurisdictions, the nature-of-the-act approach, which concludes “that the private employer cannot be held liable if the officer's actions were made in the scope of his official capacity.”<sup>57</sup> Second is the who-pays approach, which holds the private employer liable because the off-duty officer is acting in a private capacity, since “(1) that the officer's actions were within the scope of his or her private employment; and (2) that the officer's actions were taken in return for private compensation, contrary to a statute prohibiting private compensation for public duties.”<sup>58</sup> Lastly, there is the traditional agency approach, as adopted by the Tennessee Supreme Court and most recently, the Maryland Court of Appeals.<sup>59</sup>

The Tennessee Supreme Court summarized the agency principle, as it applies in Tennessee, as follows:

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<sup>56</sup> See *supra* note 38, at 718-19.

<sup>57</sup> Shannon H. Padgett, White v. Revco Drug Centers: Should Private Employers Be Held Liable For Negligence Of Off-Duty Police Officers Employed For Private Security Purposes?, 32 U. Mem. L. Rev. 537, 539 (2002).

<sup>58</sup> See *supra* note 38, at 719.

<sup>59</sup> Lovelace v. Anderson, 366 Md. 690 (Md. 2001).

private employers may be held vicariously liable for the acts of an off-duty police officer employed as a private security guard under any of the following circumstances: (1) the action taken by the off-duty officer occurred within the scope of private employment; (2) the action taken by the off-duty officer occurred outside of the regular scope of employment, if the action giving rise to the tort was taken in obedience to orders or directions of the employer and the harm proximately resulted from the order or direction; or (3) the action was taken by the officer with the consent or ratification of the private employer and with an intent to benefit the private employer.<sup>60</sup>

Furthermore, the court noted that in Tennessee, a private employer would be held liable for the actions of an off-duty law enforcement officer taken outside of the regular scope of private employment if “(1) the employer ordered or directed the action; or (2) the employer gave consent to the action, which was taken by the officer with a primary intent to benefit the employer.”<sup>61</sup>

Additionally, the Tennessee Supreme Court recognized that in some jurisdictions public policy considerations have resulted in private employers not being held liable for the actions of off-duty officers employed as security guards. According to court, “these jurisdictions generally reason that because deterrence of crime is furthered by employing police officers, private employers should be encouraged to hire such officers as security guards,” in essence granting “practical immunity to private employers in exchange for the perceived benefit derived from private employers hiring off-duty officers as security guards.”<sup>62</sup>

Although the court agreed that there was a deterrent benefit in the employment of off-duty law enforcement officers as private security guards, it also realized that there was a similar benefit to hiring traditional private security officers, therefore “eliminating vicarious liability for private employers who hire off-duty police officers encourages such employers to shift their risk

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<sup>60</sup> See *supra* note 36, at 724.

<sup>61</sup> *Id.*

<sup>62</sup> See *supra* note 36, at 721-22.

of liability to the municipality solely because their employees are also employees of the local police department.”<sup>63</sup> Still with public policy in mind, the court seemingly promoted the continued hiring of off-duty law enforcement officers by stating that “with the rule we announce today, we doubt that private employers will suddenly forgo hiring off-duty officers merely for fear of liability.”<sup>64</sup>

These various forms of analysis appear indicative of the reluctance of most jurisdictions to adhere to a traditional principle of *respondeat superior*, by crafting special rules for analyzing the liability of the private employer who hires off-duty law enforcement officers as private security officers. Consequently, the courts are implicitly promoting the use of off-duty officers in private security by essentially eliminating traditional principle of *respondeat superior* and allowing employers to escape liability in all but the most narrow of situations. The issue of liability concerning off-duty law enforcement officers is further complicated by the unwillingness of courts to impose liability on the officers’ employing agency.

For example, the Tennessee Supreme Court, in recognizing that under the dual master doctrine a municipality may also be vicariously liable for the actions of an off-duty law enforcement officer working in private security, held that:

Under Tennessee agency law, liability may also be imputed to the municipality when all of the following four circumstances are present: (1) the action taken by the off-duty officer involves exercise of a traditional police power. . . . or the power to command aid; (2) the municipality had knowledge, either actual or constructive, of the action taken by the off-duty officer; (3) the action taken by the off-duty officer simultaneously serves the objectives of the private employer and the municipality; and (4) the objectives of the private employer and the municipality, which are both served by the officer's action, are not inconsistent with each other.<sup>65</sup>

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<sup>63</sup> See *supra* note 36, at 722.

<sup>64</sup> *Id.* at 722 n.9.

<sup>65</sup> See *supra* note 36, at 725.

The court noted that the requirement of actual or constructive knowledge on the part of the municipality is required “to establish the aspect of control necessary for the imposition of liability.”<sup>66</sup> The court went on to say that “without any knowledge by the municipality of the actions taken by the off-duty officer, no opportunity or duty to control those actions can arise, and consequently, no liability can be fairly imputed to the municipality.”<sup>67</sup>

Because there are no uniform standards of analysis among the state courts for determining the liability of either the private employer or the municipality for the action of off-duty law enforcement officers employed as private security guards, it is continually difficult for private employers or municipalities to develop applicable policies for the employment of off-duty officers.

### **Federal Level Standards**

Generally, the majority of litigation at the federal level regarding the actions of off-duty law enforcement officers employed as private security guards is brought as a civil rights action pursuant to 42 U.S.C. § 1983.<sup>68</sup> Critical to litigation under § 1983 is that the actor’s conduct occurred under color of state law, which the United States Supreme Court has held to mean the actor exercised the power “possessed by virtue of state law and made possible only because the wrongdoer is clothed by the authority of state law.”<sup>69</sup> Accordingly, “it is the nature of the act performed, not the clothing of the actor or even the status of being on-duty, or off-duty, which determines whether the officer has acted under color of law.”<sup>70</sup> Thus, for a private party’s actions to be considered state action under § 1983 it must be “fairly attributable to the state.”<sup>71</sup>

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<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> 42 U.S.C. § 1983 (2006).

<sup>69</sup> West v. Atkins, 487 U.S. 42 (1988).

<sup>70</sup> Stengel v. Belcher, 522 F.2d 438, 441 (6th Cir. 1975).

<sup>71</sup> Lugar v Edmondson Oil Co., 457 U.S. 922 (1982).

The Sixth Circuit Court of Appeals has summarized the three tests articulated by the U.S. Supreme Court for determining whether a private party's action constitutes state action as: "(1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test."<sup>72</sup> Additionally, the Ninth Circuit Court of Appeals has recognized a fourth test, the joint action test.<sup>73</sup>

The public function test holds that "a private party is deemed a state actor if he or she exercised powers traditionally reserved exclusively to the state." Generally, the public function test has been interpreted narrowly, such that "the mere fact that the performance of private security functions may entail the investigation of a crime does not transform the actions of a private security officer into state action."<sup>74</sup> The Sixth Circuit has noted that "only functions like holding elections, exercising eminent domain, and operating a company-owned town, fall under this category of state action."<sup>75</sup> Accordingly, the Sixth Circuit found the detention of a suspected shoplifter is not an exclusive state function. The court stated, "[e]xperience teaches that the prime responsibility for protection of personal property remains with the individual. A storekeeper's central motivation in detaining a person whom he believes to be in the act of stealing his property is self-protection, not altruism."<sup>76</sup>

Under the state compulsion test, "the coercive influence or 'significant encouragement' of the state effectively converts a private action into a government action."<sup>77</sup> This high standard appears to require an express intent on the part of the government to use the private individual for its own purpose.

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<sup>72</sup> Chapman v. Higbee Co., 319 F.3d 825, 833 (6th Cir. 2003).

<sup>73</sup> Stanley v. Goodwin, 2006 U.S. Dist. LEXIS 55671 (D. Haw. 2006).

<sup>74</sup> See *supra* note 67, at 833-834.

<sup>75</sup> *Id.* (internal citations omitted).

<sup>76</sup> See *supra* note 67, at 834.

<sup>77</sup> Kirtley v. Rainey, 326 F.3d 1088, 1094 (9th Cir. 2003).

The application of the joint action test requires the court to consider whether “the State has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity,” such as occurs “when the State knowingly accepts the benefits derived from unconstitutional behavior.”<sup>78</sup>

Under the symbiotic or nexus test, it must be shown that there is a “sufficiently close nexus between the government and the private party’s conduct so that the conduct may be fairly attributed to the state itself.”<sup>79</sup> This examination is fact-specific and on a case-by-case basis. Furthermore, although “it is possible to determine . . . whether a person acted under color of state law as a matter of law, there may remain in some instances unanswered questions of fact regarding the proper characterization of the actions for the jury to decide.”<sup>80</sup>

Recently the using the nexus test, the Sixth Circuit ruled that the actions of an off-duty sheriff’s deputy, wearing his official sheriff’s department uniform, badge, and sidearm, working as department store security could be seen by a reasonable jury as “fairly attributable to the state.”<sup>81</sup> The court noted that “although the state played no part in the promulgation of these [the department store] policies,” the fact that the policy called for the police to be contacted in certain situations “directly implicates the state” when the off-duty uniformed officer handled the situation essentially as an on-duty officer would have. Moreover, if the suspect, because of the officer’s attire, did not feel free to leave, a reasonable jury could find “the detention was a tacit arrest and fairly attributable to the state.”<sup>82</sup>

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<sup>78</sup> See *supra* note 68, at 30-31.

<sup>79</sup> See *supra* note 67, at 834.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 834-35.

<sup>82</sup> *Id.*



Consequently, there is also little guidance at the federal level for dealing with the action of off-duty law enforcement officers employed as private security guards. This only further hampers the achievement of a uniform national standard concerning private security.

### **Summary**

Given the various types of analysis and standards at the state and federal level for determining the liability for the conduct of off-duty law enforcement officers employed as private security guards, it is evident that no nationwide standard exists. Yet, as the use of off-duty law enforcement officers increases — because of their better training and greater authority — the likelihood of litigation concerning the actions of these officers will also increase. Thus, it is incumbent upon the justice system to develop a consensus that will guide both private employers and municipalities.

### **Applying the Dual Master Doctrine**

According to the Restatement of the Law (Second) Agency § 226, Servant Acting for Two Masters: “A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.”<sup>83</sup> In the comments section regarding independent service for two masters it is noted that “the relation of master and servant is dependent upon the right of the master to control the conduct of the servant in the performance of the service . . . [and] may cause both employers to be responsible for an act which is a breach of duty to one or both of them . . . if the act is within the scope of his employment for both.”<sup>84</sup>

While § 226 appears to accurately depict the relationship a private employer and municipality regarding the actions of off-duty law enforcement officers working as private

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<sup>83</sup> Restatement of Law (Second) Agency § 226 (1958).

<sup>84</sup> Id. comm. (a).

security guards and imply that both presumably could be liable for the actions of such officers, courts seem unwilling to impute liability by such a bright line. For example, although the Tennessee Supreme Court recognized that dual master doctrine, it then proceeded to articulate a narrow test for imputing liability to municipalities under which all the listed factors must be present before the municipality will be found liable.<sup>85</sup>

Examined individually, the difficulty in meeting all four factors becomes increasingly clear. The first question is what constitutes an “exercise of a traditional police power?” The Tennessee Supreme Court itself noted that the power to arrest is not exclusive to a law enforcement officer according to Tennessee law, hence the power to arrest could be argued both as being a traditional police power and as not being a traditional police power.<sup>86</sup> Similarly, it is difficult to argue that the “power to command aid,” is truly a traditional police power, as the average citizen has always maintained the ability to summon help from others in emergencies or for security.

Second, the court did not expand on what is considered “actual or constructive knowledge of the officer’s action.” Does the court mean knowledge that the officer was working as a private security officer off-duty, or does it mean knowledge of the incident from which the litigation stems? For example, it can be argued that by establishing policies for and allowing off-duty employment, a municipality has constructive knowledge of potential liability for the off-duty actions of its officers. Additionally, how is the court’s statement that the purpose of actual or constructive knowledge requirement is to afford the municipality the opportunity to control those actions that may arise and limit their liability exposure, to be taken?<sup>87</sup> Initially, the court’s statement would seem to mean that notice is required of the specific incident which has occurred

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<sup>85</sup> See *supra* note 36, at 725.

<sup>86</sup> *Id.* at 727.

<sup>87</sup> *Id.*

so that a municipality can take proper action such as dispatching an on-duty supervisor to the scene or initiating an immediate internal investigation.

Lastly, the remaining two circumstances listed in the court's decision echo the requirements of § 226 that both employers are being served at the same time and that "the service to one does not involve abandonment of the service to the other." Consequently, the requirement that all four circumstances are needed for liability to be imputed to the municipality narrows the dual master doctrine. Thus seeking a remedy from a municipality is made more difficult.

While the Tennessee Supreme Court's holding can be seen as a narrowing of the dual master doctrine, the same cannot be said of the actions of courts at the federal level for plaintiffs seeking recovery under § 1983 from a private employer and a municipality. At the federal level, the symbiotic or nexus test broadens the meaning of § 226, by simply requiring a plaintiff show a "sufficiently close nexus between the government and the private party's conduct so that the conduct may be fairly attributed to the state itself,"<sup>88</sup> in order for the case to go before a jury. Neither the nexus test nor the court indicates a need to discuss the issue of control of the employee by either employer as noted in Restatement. This is apparent in a recent federal case, where, although the Sixth Circuit acknowledged that the sheriff's department played no part in the promulgation of the internal policies of the private employer, the court held that an off-duty sheriff's deputy clothed in the uniform of his authority, and conceivably acting in the role of an on-duty officer, could have his conduct seen by a reasonable jury as "fairly attributable to the state."<sup>89</sup> From a plaintiff's perspective the Sixth Circuit's holding stands for the proposition that off-duty officers working as private security officers in departmentally issued uniforms, carrying

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<sup>88</sup> See *supra* note 67, at 834.

<sup>89</sup> See *supra* note 67, at 834-35.

departmentally issued equipment, and acting in the role of on-duty officers, create an issue of fact for a jury whether the officers' actions can be considered state action under § 1983.

Accordingly, even when a municipality was not directly involved in the incident or the formulation of the private employer's policy, the court's holding opens the door for § 1983 litigation against both the private employer and municipality in the Sixth Circuit.

Regarding the use of the dual master doctrine in cases involving the actions off-duty law enforcement officers employed as private security officers, the holdings of the Tennessee Supreme Court and the Sixth Circuit should be considered to set the extremes in the developing dual master doctrine continuum by which the judicial system judges cases involving the conduct of off-duty law enforcement officers working as private security guards. However, this continuum does little to establish national standards by which employers, both private and municipal, can develop policies to properly manage liability exposure. Moreover, although the Tennessee Supreme Court acknowledges that without an opportunity to control the actions of the officer in question "no liability can be fairly imputed to the municipality," both Tennessee Supreme Court and the Sixth Circuit seemingly ignore the central requirement of the dual master doctrine, that "the relation of master and servant is dependent upon the right of the master to control the conduct of the servant in the performance of the service."<sup>90</sup> This lack of consideration given to an employer's control of the employee is the primary failure with the analysis of the majority of cases involving the actions of off-duty law enforcement officers working as private security. Thus, courts should consider an analysis more closely related to the § 226<sup>91</sup> which represents a middle ground between the Tennessee Supreme Court's and the Sixth Circuit's holdings.

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<sup>90</sup> See *supra* note 78 comm. (a).

<sup>91</sup> *Id.*

For the illustrative purpose of applying the various analytical options available to courts and their associated problems, consider the following facts adapted from a recent case.<sup>92</sup> An off-duty police officer of a large metropolitan department is employed by a hotel as a private security guard. The officer is required by the hotel to work in plainclothes, to prevent exciting the guests, and to carry his departmentally issued weapon concealed at all time. One evening, while the officer was working as a security officer at the hotel, two men entered the hotel lobby and pointed a sawed-off shotgun at the desk clerk in an attempted robbery. The officer, who was in the hotel lobby at the time, realized that there was an armed robbery in progress, so he drew his weapon and fired the robbers without issuing a warning. An exchange of gunfire ensued between officer and the robbers, which ended with one robber killed and the other seriously wounded. Also seriously wounded was a guest of the hotel, who happened to be in the lobby at the time and was struck by a bullet fired from the officers' departmentally issued handgun.

As previously noted under the current variance of analysis across the United States, in a minority of jurisdictions at one end of the spectrum the private employer and officer would be solely liable because he was on the private employers' payroll at the time of the incident. But an analysis based solely on who is paying and who is paid ignores that the skills, training, and firearm utilized by the officer were provided by the municipality. Thus, if the municipality failed to properly train the officer, the private employer will bear the full burden of their improper training. However, at the other end of the spectrum, the municipality would be solely liable under the facetious "Superman Theory," which in some jurisdictions says that at the moment the off-duty law enforcement officer drew his weapon he magically became an on-duty officer, thus subjecting his municipality to liability. This "Superman Theory" essentially allows the private employer to escape liability without considering the fact if the officer had been

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<sup>92</sup> See *supra* note 54 (adapted and modified for purposes of this illustration).

allowed to wear a uniform, the robbers might have been deterred from ever even attempting a robbery of a location where an armed officer was present.

Similarly, the factors articulated by Tennessee Supreme Court and the Sixth Circuit would serve to create differing holdings. According to the factors articulated by the Tennessee Supreme Court's holding, the first question would certainly be problematic; is it a traditional function of police in plainclothes to prevent an armed robbery, or is this a function shared with private security officers? Furthermore, could the department be said to have actual or constructive notice simply because it approved the officer to work off-duty? Conversely, according to the Sixth Circuit's holding, the question is whether a reasonable jury could find the officer's actions "fairly attributable to the state."<sup>93</sup> Because the officer was trained by the agency as to the use of his weapon, he was using his departmentally issued weapon at the time of the shooting, and the hotel did not provide either the training or the weapon, the answer would more than likely be yes.

Essentially, these various analyses all seem to ignore the question of control of the employee at the time of the incident by looking for only one party to consider liable. Courts seem blind to the fact that in the classic sense these employment relationships are a dual master situation, easily analyzed and argued under the factors stated in § 226. Consider § 226's application to the above facts.

First, was the act done to effect the purposes of the two independent employers?<sup>94</sup> The answer to this factor depends on what is considered the act. For the purposes of this analysis, the act will be taken to mean the foiling of an armed robbery. Both the hotel and municipality have

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<sup>93</sup> See *supra* note 67, at 834-35.

<sup>94</sup> See *supra* note 78 comm. (a).

an interest in stopping armed robberies and preventing the injury to either employees or the public.

Second, there must be a right of the master to control the conduct of the servant in the performance of the service.<sup>95</sup> Here, conduct must be differentiated from the specific act at issue. Conduct in this sense would seem to mean the off-duty officer's performance of providing the private security function. Examined in this context, both masters had control of the officer's conduct. To reduce its liability, the municipality could have promulgated rules forbidding private employment as a security officer in plainclothes, ensuring that the deterrent effect of a uniformed officer is not minimized and reducing the risk of serious encounter while off-duty. Instead the department chose to allow such employment. Similarly, the hotel controlled the officer by requiring him to wear plainclothes and conceal his weapon, as well as controlling other aspects of his conduct while working in the capacity of a private security officer. To minimize its liability, the hotel could have enacted rules to require officers to not use deadly force unless there was an imminent danger of loss of life, and for the officer to act only as an expert observer, in order to provide details of the robbers to aid in later capture.

Third, the act is within the scope of his employment for both masters.<sup>96</sup> The act of preventing or foiling an armed robbery was clearly within the scope of his employment for both the municipality and the hotel because there is nothing to indicate that the scope of his employment had been limited in any way by either employer.

Fourth, did the employee perform the act with the intent to serve one employer, while not necessarily excluding the intent to serve the other?<sup>97</sup> Again, if the act is to foil or prevent an armed robbery, it would appear that the intent to serve the hotel would not exclude the intent to

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<sup>95</sup> Id.

<sup>96</sup> See supra note 78 comm. (a).

<sup>97</sup> See id.

serve the department. The officer did what he was trained to do, and neither employer seems to have made an effort to limit the officer's response to such situation.

Thus, in an analysis examining the factors as stated in § 226, a dual master relationship would exist and both employers would be liable for the actions of the off-duty officer.

Consequently, the application of the dual master doctrine ensures that where both employers benefit from employing an off-duty officer, both will share in the liability for the officer's actions.

Advocates of other forms of analysis might argue the dual master doctrine and the use of the factors stated in § 226 will always result in both employers being liable. This is not the case. For example, if an officer working at a hotel sexually assaulted another employee, it is doubtful that the dual master doctrine would allow for recovery from the municipality as it would be difficult to effectively argue that any of the four factors were satisfied. An even less extreme example can be based on this scenario. The municipality could have taken positive steps to prevent a dual master situation by prohibiting off-duty employment in plainclothes, or requiring off-duty officers working as private security guards to only work assignments at facilities owned by government entities. Similarly, the hotel to reduce its liability could have prohibited the carrying of weapons by security officers, allowed officers to wear their departmentally issued uniform, or simply hired a private security company. Thus, both employers could have limited their liability by exercising control over the employee, and reduced application of the dual master doctrine.

In essence, using the dual master doctrine and its accompanying analysis forces both employers to exercise greater control over their employees and provides for a more just allocation of liability. Furthermore, the dual master doctrine better serves to advance public



policy by ensuring that neither employer enjoys the benefits of employing off-duty law enforcement officers while escaping the liability consequences.

### **The Public Policy Considerations**

Since the terrorist attacks of September 11, 2001, Americans have sought greater protections from all levels of government. As part of its increased awareness, the federal government sought evaluation of the current level of security across the nation. As a result of its research, the Congressional Research Service issued a report entitled Guarding America: Security Guards and U.S. Critical Infrastructure Protection.<sup>98</sup> According to the report, critical infrastructure include facilities or locations such as information technology centers, telecommunications centers, chemical plants, transportation systems, agriculture and food, banking and finance, water treatment facilities.<sup>99</sup> It is estimated that up to 5% of the approximately one million security guards employed in the United States are hired to protect property defined as a critical infrastructure.<sup>100</sup> Yet the report noted that “the effectiveness of critical infrastructure guards in countering a terrorist attack depends on the number of guards on duty, their qualifications, pay and training”; however, “there are no U.S. federal requirements for training of critical infrastructure guards other than airport screeners and nuclear guards.”<sup>101</sup>

In an effort to correct the problem, a bill was presented in Congress that would have required criminal history checks on employees and prohibited security companies from hiring individual convicted of certain criminal offenses.<sup>102</sup> Instead, Congress chose to enact the PSOEAA, which failed to contain the more stringent provision of the previous bill. Furthermore, despite the reports’ finding regarding the lack of training for private security officers, especially

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<sup>98</sup> See *supra* note 27, at 2.

<sup>99</sup> *Id.* at 3.

<sup>100</sup> *Id.* at 6.

<sup>101</sup> *Id.* at summary.

<sup>102</sup> 2004 H.R. 4022 (108<sup>th</sup> Congress) (March 24<sup>th</sup> 2004).

counterterrorism training, the PSOEAA imposes no such training requirements.<sup>103</sup> As a result of the government's failure to articulate standards for improvements in the private security industry, there has been an increasing demand to employ off-duty law enforcement officers as private security officers.

The increasing demand for law enforcement to provide security has led officers to work a tremendous number of off-duty and overtime hours. Accordingly, in the years since the terrorist attacks of September 11, 2001, some Port of Seattle police officers had "worked up to 2,000 hours of overtime a year, an average of 38 hours of overtime a week"<sup>104</sup> Not only are officers in demand for high profile terrorist targets such as the Port of Seattle, in a recent case, an officer reported working 24-25 hours, in addition to his regular hours, protecting a local business as a private security officers.<sup>105</sup> These tremendous number of work hours can have a detrimental effect on an officer's performance both on-duty and off-duty; as one expert warned, law enforcement agencies should be concerned if officers are "staying awake for more than 17 to 20 hours" at a time, as this "seems to be the general problematic range," for police fatigue.<sup>106</sup> In particular agencies should be cautious if officers are staying awake in excess of 24 hours, because at this level an officer's physical and mental performance is "roughly equivalent to a 0.10 blood-alcohol level."<sup>107</sup>

The failure of Congress to mandate changes in the private security industry has dramatically increased the demand on law enforcement to provide security both on-duty and off-duty. Accordingly, the performance level of the very officers entrusted to respond to the next major terrorist incident is substantially reduced.

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<sup>103</sup> See *supra* note 27, at 17-23.

<sup>104</sup> Sharon Pian Chan, *OT Overdone? Some Cops at Port Double Their Pay*, Seattle Times (Jan. 30,, 2006 at A1.

<sup>105</sup> See *supra* note 54, at 697.

<sup>106</sup> See *supra* note 102.

<sup>107</sup> *Id.*

## **Conclusion**

Throughout the history of the United States, the judicial branch has willingly sought to protect American workers when the legislative branch failed to respond. Employment litigation has served to eliminate child labor, improve hazardous and unsafe working conditions, and reduce employment discrimination.

Therefore, in order to ensure the safety and security of the American public in the age of terrorism, it is essential that the judicial branch utilize the dual master doctrine to promote changes in the private security industry, improve the working conditions and health of law enforcement officers by guaranteeing the protections of the FLSA are not undermined through off-duty employment, and ensure the proper allocation of liability in cases involving the conduct of off-duty law enforcement officers working as private security guards.