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On the firing line

Employers handle dilemma of workers charged with a crime.

Tresa Baldas/Staff reporter
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IN COURT: Sharon Spangler and her attorney, Jennifer Salvatore, contest Spangler's termination. Image: Frank Weir/Washtenaw County Legal News

Former DaimlerChrysler Corp. employee Sharon Spangler says she has a pretty good reason for missing a company-mandated medical exam: She was in jail on murder charges.

The company fired her, prompting Spangler to file a lawsuit last month that attorneys say raises a unique challenge for corporate America: How do you treat an employee who has been charged with a crime, but not convicted?

In the Michigan case, Spangler was acquitted of charges that she murdered her husband. The jury found that she acted in self-defense. But she lost her job while on trial and is now suing to get it back.

DaimlerChrysler maintains that she was fired because she missed the mandatory medical exam, not because of the charges.

The Spangler case highlights a growing dilemma for employers whose employees land in jail.

"I think companies are concerned that if they take action against the employee, the employee may bring a claim. And if they don't take action, others who are injured may bring a claim," said employment attorney Jonathan Fegal of Wolf, Block, Schorr and Solls-Cohen in Philadelphia. Fegal noted that companies are increasingly dealing with employees who miss work because of criminal offenses like drunk driving or assault charges.

"This pattern has arisen more than I thought," said Fegal, who recently advised a client to fire an employee who was charged with assault and had access to patients and students.

Such firings are justified, he said, maintaining that companies have a legal right to protect employees and customers from a potentially dangerous worker, as well as their reputation.

"In the criminal justice system, you're innocent until proven guilty. But in the private sector/employment context, that presumption doesn't apply," Fegal said.

Debating presumption

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But plaintiffs' attorney Jennifer Salvatore, who is representing Spangler in the Michigan case, believes the presumption of innocence should apply to workers.

"The safest thing for an employer to do is to wait until there is a jury verdict. People are wrongfully accused all the time," said Salvatore of Nacht & Associates in Ann Arbor, Mich.

In the Spangler case, Salvatore claims that DaimlerChrysler fired her client to protect its image. *Spangler v. DaimlerChrysler Corp.*, No. 06-073490-CZ (Oakland Co., Mich., Cir. Ct.).

Spangler was charged with murder in November 2002, about two days after she shot and killed her husband in self-defense. DaimlerChrysler fired her about six weeks later. She was acquitted in March 2004. By then, her job had been eliminated as part of a massive downsizing initiative.

Salvatore has filed a gender discrimination claim against DaimlerChrysler under the state's crime victims rights act, which prohibits employers from taking adverse action against a crime victim who has to appear in court.

She argues that Spangler was a victim of domestic abuse who was unfairly punished by DaimlerChrysler, and, claims that several male employees there have been granted extended leaves of absence for substance-abuse problems and other personal matters.

DaimlerChrysler has denied any wrongdoing.

"Ms. Spangler's case was treated in accordance with company policies and procedures," company officials said in a statement. "Like all employees on medical leave for similar claims, Ms. Spangler was required to attend a company arranged medical evaluation. When she failed to report for the exam, she was terminated-the same consequence other employees would have faced in this situation.

"At a time when thousands of auto workers were losing their jobs it would have been unreasonable to expect any company to hold a job open for a year-and-a-half," the company stated.

Employment attorneys note that while, generally, employers of at-will employees can terminate employees for any reason-except for discrimination or jury duty-some states have statutes limiting an employer's ability to consider an employee's arrest or criminal charge.

For example, Wisconsin, California and Hawaii all generally prohibit employers from discriminating against an employee because of an arrest record. New York, however, has a law that specifically allows employers to consider pending criminal charges in making employment decisions.

Labor and employment attorney Warren "Wit" Hall Jr., a partner at Atlanta's Alston & Bird, said employment decisions shouldn't have to be based solely on acquittals.

"Just because there was an acquittal in criminal charges doesn't mean that there wouldn't be a problem for you in the workplace," Hall said. "They could still pose a danger to your company." In recent years, Hall advised a *Fortune* 100 company to fire an employee who had been acquitted of a violent crime, but had contact with customers.

"Even though [the employee was] acquitted, we felt that they could and should make that decision," Hall said.

He noted that "[p]erhaps the biggest danger in this area of dealing with employees charged with crimes is that you're not going to apply the policies consistently, and you set yourself up for a disparate treatment claim," Hall said.

Karl Lindegren, a labor and employment lawyer at Fisher & Phillips' Irvine, Calif., office, recently advised an auto dealership not to hire an applicant whose criminal background check revealed he was out on bail on five felony charges related to burglary and possession of a loaded weapon.

According to Lindegren, state labor officials argued that the company should have hired him anyway because state law bans asking employees and applicants about current criminal charges.

"My argument to them was, 'Would you want to buy a car from this guy?' " Lindegren said. "Are you going to put this guy to work and put him on test drives? It's a liability. What if the guy does something?" "

Lindegren also had a client who earlier this year fired an employee after seeing him on a *Dateline NBC* special that revealed alleged child predators. The company fired the employee not because of the alleged crime, Lindegren noted, but because he lied about where

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he was during the show. He said he was home with tonsillitis, he said.

"The way we got around that was he had lied," Lindegren said, noting California law makes it tough for employers to take action against employees accused of crimes. "Arrest records, you cannot even ask about them."

Lindegren also cited a 2003 court decision in which a federal judge found that a trucking company violated a law when it removed an employee from a driving position because of pending driving under the influence charges. *Piutau v. Federal Express Corp.*, 2003 WL 1936125 (N.D. Calif.). "It makes employers think twice about what do you do about employees who drive for a living," Lindegren said.

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