When Employees Solve Problems With Their Fists

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Generally speaking, human resources professionals and business executives have become quite adept at dealing with employee claims for illegal harassment. For example, just about any HR manager can provide a definition of a "hostile work environment." Likewise, HR managers are keenly aware of what to do when handling workplace romantic relationships or inappropriate conduct that have the potential to generate a lawsuit.

But can HR managers provide a legal definition for the term "assault?" This has become an important new concept for managers to learn in supervising employees and ensuring that the workplace is not a breeding ground for litigation. HR managers are accustomed to investigating employee complaints with an eye towards the common federal claims upon which they have been trained, but they are now going to have to pay attention to emerging state-law claims, as well.

How Assault And Battery Is Different

Civil claims for assault and battery have existed for decades, but in recent years, lawyers representing employees have started to make use of these claims with increasing frequency. Here's why:

Civil assault is typically defined as an instance when a person demonstrates the intent to hurt another and the victim believes that they will be hurt. There is no requirement of actual contact or physical injury, which is why the legal definition of assault is so different than the common English meaning. The legal standard is relatively low and contains a subjective element, i.e. that victims believe that they are in danger of immediate harm. Thus, an assault claim can be hard for an employer to disprove. Likewise, a battery is typically defined as a physical touching without consent. Again, the standard here is often fairly low.

Assault-and-battery claims regularly come down to contested factual questions, usually between the recollection of the victim and the alleged wrongdoer as to the nature and specifics of the incident in question. It can be hard to get summary judgment in these "he said, she said" situations.

In contrast, federal discrimination and harassment claims involve either adverse employment actions for which the employer is in possession of the relevant information regarding the rationale for the action or a hostile work environment, which is a high burden for an employee to meet

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Assault-and-battery claims are based on state law, which means that an employee can usually avoid having the case heard in federal court. This is significant because state judges are often less likely to grant summary judgment and are more prone to take a hands-off approach to discovery.

Most states do not have a broad body of reported case law regarding assault-and-battery claims, especially in the employment context. This stands in contrast to federal law on discrimination and harassment claims, which is extensive and generally useful for an employer seeking summary judgment on claims brought by a former employee.

In short, assault-and-battery claims are harder for an employer to litigate in a clean, quick fashion. They are more fact-intensive, there is less law upon which an employer can rely, and they are typically litigated in forums that are more favorable for employees. That means that the settlement value of an assault-and-battery claim is often higher than that of a discrimination or harassment claim based on the same facts.

So what should a prudent supervisor or human resources manager do to best protect a company against an assault-and-battery claim? Here are a few basic steps:

Be aware that these claims are real. The first step in guarding against a threat is to know that it exists. It's important for managers to be aware of the applicable definition of assault and battery in their jurisdiction. Although the definitions are generally similar, there are important variations from state to state.

1. Listen for the key terms

One of the basic skills for being a good HR manager is being an adept listener. Dealing with potential assault-and-battery claims is no different. With discrimination and harassment claims, the focus is on whether the employee is being treated differently on the basis of a protected characteristic, so the words to listen for all relate to fairness and equal treatment.

But with assault, the focus is on whether the employee was in apprehension of an injury and with battery, the focus is on actual physical contact. The key words to listen for relate to fear and then to any sort of touching. The treatment of other employees is critical in a discrimination or harassment case, but not as much with assault and battery.

2. Ask the right questions

In a harassment or discrimination claim, HR managers know to ask questions about how the supervisor or coworker treats other employees, and how that conduct affected the complaining employee's ability to do the job. Critical questions in the assault-and-battery context, include "did he actually make contact with you?" "do you have any injuries?" "do you need to speak with a physician or a mental health professional?" "did you feel like you were about to be physically harmed?" and "what made you feel like you were in danger of an injury?"

3. Document the results of the investigation
This is good advice for any investigation, but it is especially important in the assault-and-battery context because employees rarely know that assault and battery can be civil claims against their employer. A prudent HR manager should try to avoid a situation in which an employee has a general sense of being disrespected and then over the course of an interview with a lawyer, is directed into describing the incident as one of assault and battery.

Getting an employee to document a grievance in the immediate aftermath of an incident can be very useful in combating the coached descriptions that can come out once an employee has been prepared for a deposition in a civil suit.

4. Emphasize the importance of avoiding fear and physical contact in the workplace
Again, this is good advice in general, but the specter of an assault-and-battery claim can be useful ammunition in dealing with employees (and especially managers) who come too close to the line for acceptable conduct.
For instance, a supervisor who is sometimes loud and aggressive with subordinates might defend that style of managing as being necessary in the particular work environment. It's one thing to defend that manner of management as being a personal style; it's another thing to have to defend that style after being told that placing employees in a state of fear of injury can expose the company to the possibility of defending a messy lawsuit.

Asking that supervisor "do you really want to have to explain in a deposition that you did not intend to hurt that employee in a situation where the employee says that they were in fear of immediate injury?" can get the point across quite effectively.

5. Use arbitration agreements
Arbitration provisions are not perfect for every employer-employee relationship, but the assault-and-battery context is one in which they can be useful. Defending against assault claims can be challenging, as you need to convince the fact finder that the conduct of the accused might have been insensitive or even rude, but it did not meet the legal definition of assault.

That argument will be far more effective when the fact-finder has a legal background, as is the case in arbitration and is not the case in a jury trial. Arbitration provisions are not a panacea, but when weighing whether or not to use them, the prospect of an assault-and-battery claim is increasingly as one factor to consider.

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