What Hotel Leadership Should Know About the Emerging Trend of Assault and Battery Claims

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Ask nearly any leader in the hotel industry and/or their HR manager for the definition of a "hostile work environment," and they will have a pretty solid answer. That's because many of them have had to handle employee claims for illegal harassment. Further, these leaders, for the most part, have dealt with such employee issues as inappropriate conduct that have the potential to become a lawsuit.

Now ask these same leaders and their HR managers to provide a legal definition for the term "assault." Getting an accurate definition likely will be more difficult. But it is a legal awareness that is becoming more important for managers to understand in supervising their hotel employees and ensuring that the workplace is not a breeding ground for litigation. While HR managers are accustomed to investigating employee complaints with an eye towards the common federal claims upon which they have been trained, they are now going to have to pay attention to emerging state law claims, as well.

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 more frequently. Summarized below are the primary reasons for this shift:

- Civil assault is typically defined as an instance in which a person demonstrates the intent to hurt another and the victim believes that he/she 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 the victim believes that he/she is in danger of immediate harm. Thus, an assault claim can be hard for an employer to disprove. Likewise, 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(s) in question. Thus, 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 a plaintiff to meet.

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- Assault and battery claims are based on state law, which means that a plaintiff can avoid federal court (provided that the plaintiff is not also pleading federal claims and diversity jurisdiction does not exist). 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. Thus, 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.

Therefore, hotel leaders and their HR personnel should follow some specific steps to help protect against an assault and battery claim. Here are a few such steps:

1. **Be Aware That These Claims Are Real** - The first step in guarding against a threat is to know that it exists. Thus, it is 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.
2. **Listen For the Key Terms** - One of the basic skills necessary 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 hotel's employee is being treated differently on the basis of a protected characteristic. Thus, the words to listen for all relate to fairness and equal treatment. 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. Thus, 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.
3. **Ask the Right Questions** - HR managers have grown adept at looking for the key factors for a harassment or discrimination claim when a hotel employee complains about the conduct of a co-worker, especially when that co-worker is a supervisor. So for example, HR managers know to ask questions about how the co-worker treats other employees and how the co-worker's conduct affected the complaining employee's ability to do his/her job. HR managers are less experienced in asking the questions that are critical in the assault and battery context - questions like "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 he place you in a position in which you felt like you were about to be physically harmed?," and "what about his conduct made you feel like you were in danger of an injury?"

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4. **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 a hotel 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(s) as one of assault and battery. Thus, getting an employee to document his or her grievances 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.
5. **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 his way 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. An HR manager can ask 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 he/she was in fear of immediate injury?" and get the point across quite effectively.
6. **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 for any employer in the hotel industry, as it needs 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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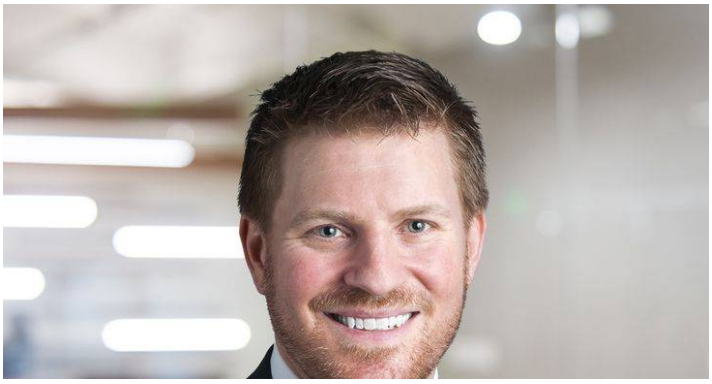

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