

The Impact of Emojis on Employment Litigation

By Darin M. Williams



Emojis, or “picture characters,” as the word means in Japanese, have officially entered our lexicon. The Oxford Dictionaries’ Word of the Year in 2015 was the “Face with Tears of Joy” emoji, and the New York Post reported last year that “[o]ver 90 percent of the world’s 3.2 billion Internet users regularly send these “picture characters.” Vyvyan Evans, *Emojis Actually Make Our Language Better*, N.Y. Post (Aug. 12, 2017).

Language professor Vyvyan Evans posits that emojis serve the same function in “textspeak” as body language serves in spoken communication by “fill[ing] in the emotional cues otherwise missing from typed conversations. It allows us to be more effective communicators.” On the other hand, a 2016 research study found that people were unable to agree on the sentiment intended by a particular emoji 25 percent of the time. Eyder Peralta, *Lost In Translation: Study Finds Interpretation Of Emojis Can Vary Widely, The Two-Way* (Apr. 12, 2016).

Given that emojis are used to fill in emotional cues, but the emotional meaning of one out of every four emojis is ambiguous, it is not surprising that emojis have increasingly been the subject of federal discrimination litigation. According to a Bloomberg Law analysis, “since 2010, employees have filed at least 39 federal discrimination, harassment, or retaliation lawsuits that include emojis or emoticons in their allegations.” Bloomberg Law, *A Double-Edged Smiley? Emojis in Employment Suits Cut Both Ways* (Apr. 19, 2018). And while this number is still a small fraction of the total federal discrimination cases, nearly half of those thirty-nine cases were filed in 2017 and 2018, demonstrating the rising impact of emojis on workplace litigation.

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Although the sample size of emoji cases is small, several recent federal court opinions demonstrate the outsized role that emojis can play at summary judgment for both employees and employers.

For instance, an employee may use an emoji to demonstrate quid pro quo sexual harassment, as in *Mims v. Chilton Med. Ctr.*, No. 11-cv-41, 2012 U.S. Dist. LEXIS 27755, *6, *16 (M.D. Ala. Mar. 2, 2012), in which the court denied an employer summary judgment on an employee’s sexual

harassment claim due in part to the temporal proximity between the employee’s termination and her supervisor sending her an “I love you” emoticon via text.

An employee may also use an emoji to demonstrate pretext, as in *Apatoff v. Munich Re Am Servs.*, No. 11-cv-7570, 2014 U.S. Dist. LEXIS 106665, *34-35 (D.N.J. Aug. 1, 2014), in which the court denied an employer summary judgment on an employee’s FMLA retaliation claim due, in large part, to smiley face emoticons included in manager emails discussing the employee’s termination. The court found that the emoticons, sent on the day of the employee’s termination, could lead a reasonable jury to conclude that the employee’s managers were “happy to terminate Plaintiff because her FMLA leave was inconvenient for them.”

On the other hand, emojis may be useful evidence for the employer, too, as in *Arnold v. Reliant Bank*, 932 F.Supp.2d 840, 854-55 (M.D. Tenn. 2013), in which the court granted an employer summary judgment on an employee’s hostile work environment claim in part because the employee’s use of a smiley face emoticon in her performance review demonstrated that she did not perceive the work environment to be hostile.

Similarly, in *Stewart v. Durham*, No. 16-cv-744, 2017 U.S. Dist. LEXIS 88656, *2-3 (S.D. Miss. June 9, 2017), the court granted summary judgment on an employee’s claims for intentional and negligent infliction of emotional distress against her supervisor. Although her supervisor sent her a picture of a “tumescent penis,” the employee’s texted responses included, among other things, emojis blowing kisses and winking and, therefore, “[did] not indicate distress.”

Most recently, in *Mooneyhan v. Telecomms. Mgmt., LLC*, 16-cv-118, 2017 U.S. Dist. LEXIS 188743, *32-34 (E.D. Mo. Nov. 15, 2017), the court granted an employer summary judgment on an employee’s hostile work environment claim despite numerous sexual advances by her supervisor. The court determined that by concluding her emails to management with smiley face emoticons around the same time she was allegedly harassed, the employee “undermine[d] her claim that she subjectively believed that her working conditions were abusive,” and no reasonable juror could believe that the supervisor’s conduct rose to the level of a hostile work environment.

Mitigating the Impact of Emojis in the Workplace

The inexorable creep of emojis into workplace litigation and their apparent effect on legal outcomes demonstrates the importance of mitigating emojis in the workplace.

For an employer, the first step should always be prevention. Most standard anti-harassment policies should be broad enough to encompass emojis without having to change the policy's language (if not, it's time for a new policy). However, employers should consider discussing emojis in anti-harassment and communications training to specify that the employer's normal expectations apply to emojis and emphasize the risk of misinterpretation in communicating via emoji. Moreover, as a best practice, managers should avoid using emojis with their subordinates and should never use emojis when discussing employment decisions, as the cases discussed above teach that tacking a smiley face onto an email discussion of an employee's termination or discipline could send a case to trial.

The second step in mitigating emojis in the workplace is to ensure a thorough response when emojis are included as part of a workplace complaint. Perhaps more than any other form of communication, emojis must be placed in context. Seemingly innocuous symbols may become imbued with sexual or other meaning depending on how they are used. For instance, a string of scissor emojis could be a reference to an employee's sexual orientation if sent as part of a discussion of a female employee's relationship with her girlfriend. *Cf. Bellisle v. Landmark Med. Ctr.*, 207 F. Supp. 3d 153, 160 (D.R.I. 2016). Even a corn cob emoji could be a symbol of sexual harassment where it is sent among managers to reference an inside joke objectifying women. *Caras v. Mike Isabella, Inc.*, 18-cv-749 (D.D.C.). And,

of course, it is not hard to imagine how a winking emoji, or a tongue-out emoji, or any number of other emojis could be subverted to a lewd or inappropriate purpose.

Thus, when investigating a workplace complaint, an employer should include all emojis in its analysis and pose questions targeted to ascertain the meaning of the emojis in the context of the communications at issue. What are the "emotional cues" being filled in by emojis and what, if anything, do they say about the states of mind of the sender and receiver? The answers to these questions should influence any response or remediation, and could be used as evidence in any resulting litigation.

As emojis have become a mainstay of our communication, they have increasingly become part of workplace complaints. Yet the case law demonstrates that emojis may be used to defend federal discrimination claims just as they can be used to prosecute the claims. Employers and their counsel should seek fluency in the language of emoji because, in this case, a picture may be worth a thousand words—or a summary judgment win.

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Leadership Note—The Chair's Corner

Embrace Millennials

By Baxter D. Drennon



Recently, the Southwest Region of DRI invited me to speak at its regional meeting on the topic of Millennials. As a Millennial, I was excited for the opportunity to address the myths and stereotypes of our (the vast majority of DRI YLs are Millennials) much maligned generation. I chose the presentation title Don't Hate, Appreciate Millennials, and I set

out to do the research to refute the most common allegations made against our generation.

In doing the research, I was surprised to learn that the criticisms heaped on Millennials do not just come from those of more senior generations. Instead, apparently some Millennials have bought into these criticisms. Those Millennials said the following about our generation: