

## **Are Emojis the next Workplace Crisis?**

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### **ABSTRACT**

Emojis have become a common part of our digital world due to their frequent use in business communications, as well as in personal emails, texts, and social media. The use of emojis in business communications brings with it litigation concerns due to potential misunderstandings and miscommunications pointing to the need for businesses and other organizations to develop policies regarding their use. This article reviews recent cases to determine trends and some of the challenges regarding the use of emojis inherent in litigation in general and in electronic discovery in particular. While there are no overarching legal trends in the court decisions thus far, organizational management should still address policy issues raised. Recommendations for organizational policies include development of policies regarding the use of emojis in general and issues that may arise in potential litigation involving use and interpretation of emojis in business communications.

Key words: Emojis, Emoticons, Litigation, Electronic Discovery

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## INTRODUCTION

Emojis are no longer just a decoration with which to end messages. They are a complex, robust form of digital language that continues to evolve and expand. (Cohn & Engelen, 2019) Emojis are everywhere and not limited to personal communications. They appear in all forms of electronic communication and are increasing in use every day in the business world. According to Emojipedia, the use of emojis has increased substantially in the last few years, a trend that will likely continue well into the future. (Solomon, Kelly, & Burge, 2020) According to one study, at least 2.3 trillion mobile messages incorporate emoji annually. (Goldman, 2018). Goldman studied cases involving emojis between 2004 and 2020. In 2020 he found over 120 cases in the USA alone. (Goldman, Emojis and emoticons in Court Opinions, 2020) A serious problem for future use of emojis is the potential for misunderstanding. (Foltz & Fray, 2021)

This trend in emoji use begs answers to several questions regarding their use. For example, whether emojis belong in the workplace at all? Why do emojis exist in the first place? Whether there exist any negative aspects of their use that might potentially result in liability, not only individuals, but more broadly, for an organization under the doctrine of respondeat superior? Should the interpretation of the meaning of an emoji should be based on the sender's intent, or whether the interpretation of the meaning should be based on the recipient's perception of the sender's intent? Can cultural differences result in simple misunderstandings at best, or lead to major offense at worst? Contrasting argument claims emojis are gaining use as an alternate method of speech with people with challenged by regular writing. (Kilrey & McMahon, 2018) As a result do business need to allow emojis under ADA requirements?

The resolution of these issues is critical to business and other organizations that conceivably may encounter legal liability unless a policy is in place that addresses the concerns expressed. In order to address these issues and to identify the key components of such a policy, an examination of recent legal cases involving emojis may provide insights into the current state of the law as well as the directions and trends in the law developing in this area. Based upon such insights, one should be able to develop policies for organizations to minimize potential liability risks. Before reviewing recent cases, however, it is instructive to review the history and background of emojis.

### History and Background of Emojis

Emojis were the natural outgrowth of the original emoticons, text representations intended to express an emotion to make texts in emails and text messages more expressive. The most common emoticons were a smiley face or frowning face created with typewritten punctuation marks, such as :- ) and :- (. In typical face-to-face communications, people rely on body language in addition to the spoken words and tone of the speaker, as well as any bodily gestures to grasp the full meaning of the communication. Emoticons, and later the more graphic emojis, served as a partial substitute for body language to indicate to the reader the emotional context of the sender. (Bai, Dan, Mu, & Yank, 2019) For example, in a bare-text email or text message, a sarcastic comment may not be understood to be sarcastic, thereby losing the true essence of the intended message. Other potential misunderstandings of bare-text emails and text messages may occur as well. For example, confusion may result if the reader interprets a given message to be intended as a double entendre when such was not actually the case. Alternatively, a misunderstanding may result if a double entendre was the sender's intention.

Emojis are increasing in popularity in the workplace. Both criminal and civil litigation, and national and international litigation have involved the use of emojis. At the present time there is no consistent finding by the courts as to emojis' importance or meaning in either criminal or civil cases. The two major issues in the use of emojis are the meaning and perception of the emoji. Can an emoji totally negate the traditional textual meaning of a sentence? For example, if one employee sends an email to another and states, "I want to kill you," and then adds a smiley face at the end, is that a threat or a joke? What if an employee receives an email that states, "I really appreciate everything you do," and then ends with an emoji holding a gun? Are either of these sentences threats or are they jokes? Which matters more: what the recipient thinks or the sender's intention? As one writer mused, "Should these symbols be interpreted a literal portrayals of the sender's thoughts..." (Sullivan, 2016) or does it depend on the specific case at hand?

Emojis are being used in the workplace in electronic communications from colleague to colleague, from supervisor to employee, from employee to supervisor, and from employee to the public and clients. Emojis have become the method for quickly communicating ideas, thoughts and opinions. Business must quickly prioritize this potential problem and develop policies concerning their use in order to avoid costly litigation.

One major issue with allowing the use of emojis in the workplace is the lack of a definitive understanding of the meaning of any given emoji in all contexts. Indeed, the same emoji may have different meanings in different contexts. Emojis' meanings are evolving and new emojis appear suddenly. (Bai, Dan, Mu, & Yang, *Frontiers in Psychology*, 2019) Emojis can convey different meanings to different people and have different meanings at different times. Can there be a generational difference in the meaning of emojis? (Krohn, 2004) Is a "thumbs up" necessarily a sign of agreement or can it mean something else? Can the thumbs up emoji be used sarcastically? In some cultures, such as in the Middle East, Greece and Australia, the thumbs-up symbol can be seen as an obscene gesture. (Guntuku, Mingyang, Tay, & H., 2019) In a multicultural workplace environment should this symbol be banned? Attorneys in litigation will be scrutinizing all electronic communication and arguing the meaning of emojis that the harassment was not unwelcome, they were simply kidding, or you misunderstood the meaning, or it is protected free speech?

Business and other organizations must be aware of this issue and be prepared to address it effectively. Before addressing the issue, however, one must consider recent litigation involving the use of emojis and identify trends in the law that may exist.

## RECENT LITIGATION

Given the widespread use of emojis and the ambiguity of meaning that may arise from their use, it is no surprise that recent litigation has involved the use of emojis. Following a review of these cases and potential trends in the law, one may then be able to consider prudent strategies for business and other organizations to minimize the potential for legal liability.

First, in *State of Connecticut v Nero*, emojis were described as "little cartoon face(s) that can be added to the text of an instant message." (*State of Connecticut v Andrew J. Nero*, 2010) Most importantly, the court found that the "faces come in numerous expressions and are used to illustrate how the speaker is feeling or the intended meaning of what he or she has written." This interpretation of emojis tends to emphasize the sender's intention more than the recipient's understanding of the sender's intention. (*State of Connecticut v Andrew J. Nero*, 2010)

Significantly in *Bland v Roberts*, the court recognized the use of the thumbs-up emoji as a statement protected under the First Amendment. (*Bland v Roberts*, 2013) In this case six plaintiffs and former employees of the sheriff's department "liked" the campaign of the opponent of the current sheriff on his Facebook page. When the current sheriff was reelected, he did not reappoint the six deputies who "liked" the other candidate. The six plaintiffs filed a lawsuit stating that Roberts had violated their First Amendment rights and that the thumbs-up symbol was protected under the First Amendment Right to Freedom of Speech. On appeal, the Fourth Circuit held that "liking" a politician's campaign Facebook page did, in fact, constitute protected speech under the First Amendment. In doing so, the court resolved an issue of first impression that interconnects First Amendment jurisprudence with social media's influence on how people express themselves. The court found that although the First Amendment applies only to traditional speech, the expressive nature of particular actions should also be afforded protection. Expressive conduct, falling within the scope of the First Amendment, must be "sufficiently imbued with elements of communication." (*Bland, B.;Carter, Daniel;Dixon, David; McCoy, Robert; Sandhofer, John; Woodward, Debra v B.J. Roberts individually and his capacity of Sheriff of the City of Hampton, Virginia*, 2013)The Supreme Court has determined that there are a number of symbolic acts that constitute speech and are thus afforded protection under the First Amendment.

The growing problem in the workplace is that most people are now using emojis as part of their electronic communications. More than 92% of all digital users have used emojis in their electronic sources and nearly a third use emojis on a daily basis. The courts have already accepted the emoji as a form of communication. (Terradas, 2021) In a U.S. Supreme Court case a husband was writing threats to his wife on Facebook, but at the end of each sentence the husband put the emoji of a smiley face with his tongue sticking out. His threats included statements like "There is one way to love you but a thousand of ways to kill you. I am not going to rest until your body is a mess, soaked in blood and dying from all the little cuts." (*U.S. v Elonis*, 2015)

The husband claimed the emoji showed that he was kidding and thus protected under the First Amendment Freedom of Speech. (First Amendment, 1781) His attorneys argued that despite threats to his wife, an FBI agent and others that he did not intend his speech as threatening and that he was an aspiring rap singer. Elonis had been convicted at the trial level as a violation of 18 U.S.C. sect 875c. which states "It is a federal crime to transmit in interstate or foreign commerce any communication containing ...any threat to injure the person of another." (*Crimes and Criminal Procedure*, 1909)

The main issue in this case was whether a conviction of threatening another person over interstate lines required subjective proof or whether it is enough to show that a reasonable person would regard the statements as threatening. In the end the Supreme Court overturned Elonis' conviction and decided the case on other issues and left this bigger more complicated issue unanswered.

In another case, the court found that a wink-face emoji was insufficient evidence to convey the defendant's interpretation that the wink-face provoked his violent action. The court concluded, "to find otherwise would require us to make an unsupported assumption of the emoji meaning." (*State v Shepard*, 2017)

In one case in which the emoji was one of the deciding factors in a sexual harassment case. Darlene Murdoch an employee of Medjet Assistance accused her male supervisor, Mr. Roy Berger of sexual harassment for a period of six to seven months. She filed a complaint with Medjet and with the EEOC. Shortly after having her lawyer send a letter of complaint, she was

fired. She claimed she was fired for reporting these unwanted sexual harassment messages. Mr. Berger and Medjet claimed that Murdoch was fired for failing to do her work correctly. The court found that because Murdoch sent a smiley face to her boss, referred to him as “my dear” and hugged him that these actions showed that there was no sexual harassment and the case was dismissed. (Murdoch v Medjet Assistance LLC, 2018)

In another rather strange sexual harassment case the defendant won because of an emoji. Judge Cote of the New York District court determined, based on “clear and convincing evidence,” (In Rossbach v Montefiore Med. Ct. , 2021) that the plaintiff had fabricated the emoji and the text between the plaintiff and defendant. The plaintiff had sued the defendant based on alleged sexual harassment with her main proof by e-mails allegedly sent to her from her supervisor Morales. Some of the emails allegedly from Morales read “Happy Birthday Hotstuff!” sent on June 29 2017. Another email dated November 13, 2017 read “Andrea my lil virgin (with emoji smiling face with heart eyes) how long are you going to make me beg for pics in the G-string I gave you? No one has to know...” (In Rossbach v Montefiore Med Ctr, 2021) One last email dated November 23, 2017 read, “You look hot today.” (In Rossbach v Montefiore Med. Center, 2021)

The defendant had expert forensic experts testify that the emoji contained in the message on November 13, 2017 was not available in that format on the email formats presented to the court. Even smiling-faced emojis with heart eyes will appear differently on different equipment or not be available at all. The court dismissed the plaintiff’s case and exercised her right to sanction the plaintiff pursuant to Fed.R.Civ.P. 37€. In addition to the sanctions of the Rossbach, the court further ruled, “ In short, at every step of these proceedings, Alktras (Plaintiff “s attorney) failed to take reasonable steps to preserve critical evidence and failed to take reasonable steps to preserve critical evidence and failed to recognize the gravity of his client’s misconduct and its implications for his own duties. He instead burdened the defendants and this Court by suborning his client’s perjury and making frivolous and procedurally improper legal and factual arguments. A monetary sanction against Altaras and DSLG is warranted.” The Court imposes a monetary sanction under its inherent and Section 1927. As with the monetary sanction against Rossbach , the monetary sanctions shall be in the amount of the defendant’s attorney fees, costs and expenses associated with addressing Rossbach’s misconduct.” (In Rossbach v Montefiore Med. Ctr., 2021)

What does a winking emoji mean? Can there be a sexual overtone? Does it mean I am being sarcastic? Can a winking emoji tell the recipient I mean the opposite of what I just wrote? Can the emoji mean different things to different people based on their age, race, sex, culture or life experiences? Can the emoji totally negate the words? As one blogger wrote, “Emojis have taken on secondary and even tertiary meanings and the meanings and understanding can change in the time it takes a tweet to viral.” (Hewitt, 2021) One defendant in a criminal trial asked for a new trial based on his claim of ineffective counsel when his court appointed attorney emailed the prosecutor offering “to stipulate my client is guilty” but ended the sentence with a smiley face. Did the smiley face totally reverse the message sent? According to the judge it did. In United States v Christensen, the judge found that because the emoji it was a frivolous email so it could not be taken seriously by anyone. Does it really matter if the prosecutor and judge did not take the words seriously if it made the defendant feel he could not trust his attorney or the legal system? (United States v Christensen, 2015)

Harrison v. Tampa involved the plaintiff receiving emojis that included face kissing, a face with hearts for eyes, and a smiling dog with hearts next to it from her supervisor and co-worker. These emojis accompanied text messages that read, "Damn, you are so sexy" and "Sitting here thinking about you, Sexy Red." Furthermore, the co-worker started bringing her gifts like shoes and underwear. At first the plaintiff responded with smiley face emoji and later complained to her superiors. In the meantime, she started an affair with a different employee by the name of Wright. Wright complained to his supervisor that the plaintiff Harrison was threatening him if he broke up with her. During the discovery process the plaintiff stated she was unable to provide all the text messages because her phone flew out the window in a car accident. She was fired after she complained. She then claimed retaliation. The court granted the City summary judgment because they could not do anything to respond to the alleged sexual harassment of Harrison without knowledge. Once Harrison made a complaint they started an investigation and they had (Harrison v City of Tampa, 2019) the right to fire Harrison because of her threats to Wright. Emojis are a part of this case, but the judge merely mentions them in the footnotes and without visual copies. Although this case did not find the emojis to be a deciding factor, they may have been if the case had not been dismissed.

In an Ohio wrongful termination case, the plaintiff James Kara was a probationary employee of the Ohio Tax Division. Since he was a probationary employee, he was considered an at-will employee, and thus, could win his case only if he showed malice on the part of his employer. Kara argued that one of his supervisors sent an email with a frowning face to another supervisor discussing plaintiff's performance. The court found that the frowning face and emails did not rise to the level of malice. (James Kara v Ohio Department of Tax, 2013) If the employee had not been a temporary employee would the outcome have been different?

In a California case a boss sent his employee sexually charged emails and the employee filed a sexual harassment suit. The problem in this case is that the recipient sent an email to her boss with a red lips kiss mark. At issue in this case is whether the kissing emoji imply consent? This case has not been decided yet, but the recipient's emoji is one of the central issues in the case. (Harrison, 2019)

Are emojis becoming the equivalent of body language clues to the true meaning of the statements? In a 2015 criminal case, referred to the Silk Road Case, the defendant Ross Ulbricht was convicted of conspiracy in an underworld scheme to sell illegal items on an eBay type of platform for drug dealers and other criminals. The defendant posted the words "I'm so excited and anxious for our future, I could burst." A smiling face followed the words but the prosecutor did not present the existence of the emoji. (United States Of America v Ross William Ulbricht , 2017) The defense argued that the jury must see the emoji and the communication in its written format. The court in this case agreed that the jury had the right to see the emoji and see the post in its written format. (United States of America v Ross William Ulbricht, 2017)

In another case, a 12-year-old girl from Virginia was charged with terroristic threats because her emojis showed a gun, bomb and knife and she wrote "Meet in the library Thursday." With all of the school shootings in the past few years, the resource officer took the threats seriously and sent an emergency request for the IP address. The investigation led to the 12-year-old girl who was posting threats under another student's name. The young girl admitted sending the emojis and messages but gave no reasons for the messages. Her mother said the girl had been bullied in the past. The girl in this case was underage and referred to juvenile court. Any disposition would be private but it provides a clear message to other students that the schools and courts will take them as a serious threat. (Hahn, 2016)

An issue unaddressed in these cases yet likely to be significant in future cases as the use of emojis increases is that of electronic discovery. The implication for future litigation is one of the most important issues to consider with respect to the impact of emojis in litigation.

### **Implications for Electronic Discovery**

There are several problems with providing emojis in discovery at the present time. First, most current software programs are not equipped to find emojis. Some software companies are addressing this issue but do not have definitive search algorithms yet. Part of the problem in collecting emojis is that many emojis are copyrighted to a particular device. A happy face on one system will not look the same on another system. To find the emojis the searcher would need to know what device or platform was used, that is, iPhone, Android, Facebook, Instagram, or Google among others. The data searcher would have to consider each of these to find the emojis contained in the electronic data.

Any data that is stored in an electronic form may be subject to production under e-discovery rules. This rule would include electronically stored emojis. eDiscovery is the process where parties must share, review and collect electronically stored data in a legal matter. One major challenge is that eDiscovery technology is not equipped to find all the emojis in use. Relativity, a leader in this field, created RSMF format that allows eDiscovery experts view short message format files. Their format allows the expert to search for specific emojis. The problem is this format recognizes only 1000 different emojis. Slack, a business communication platform, alone had 26 million different emojis. (K, 2021)

How much responsibility does an attorney have to verify the emojis creation timeline? The first step is to place a legal hold on the preservation of data as soon as litigation is foreseeable. Foreseeable lawsuits could include when an employee is terminated, when harassment allegations arise, or when discrimination allegations are made. The legal hold must include preserving emojis with their surrounding text and the device on which it was sent. When sending to an opposing party a litigation hold, the same information should be requested.

If emojis are allowed in business, employees should submit information concerning their use, the meaning to them and the equipment used to send the emojis each time one is used. This preservation must also include those in possession of a non-party messages of which they have control. In the Van Zant case the court imposed an adverse inference against the defendant for failure to preserve text messages in the possession of a non-party where the court found that the defendant had control of the non-party's electronic data. In this case defendant Cleopatra Records intended to make a movie about a plane crash that killed two members of the rock group Lynyrd Skynyrd. Screenwriter Jared Cohn was hired as the director and screenwriter of the film. Cohn was paid by Cleopatra, but was not an employee. The plaintiffs sent a cease-and-desist letter over filming the story of Lynyrd Skynyrd Band members' deaths, and then filed suit. Cohn, a non-party, switched cell phone companies. Cohn did not preserve text messages including those sent and received by the parties in the litigation. Although Cleopatra argued they had no control over non-parties' actions, the court disagreed and found that a duty to preserve exists "if a party has the practical ability to obtain the documents from another irrespective of his legal entitlement." (Ronnie Van Sant, Inc. Pyle , 2018)

In all civil cases, including cases originating in the workplace, the emojis must be available to the opposing attorney for review. "Statements containing emojis have to be viewed in the context to determine how, if at all the emoji changed, distract from, or added emphasis to

the meaning of the statement at issue.” Emojis could provide critical information to litigators in providing meaning and clarification. There will be a need to find the emoji and its content for examination by parties. The court granted sanctions finding that rule 37€ (1) permits the court to sanction a party who fails to take reasonable steps to preserve electronically stored data.

Businesses must be aware of this requirement when dealing with third parties and the requirement of litigation holds. (Failure to make Disclosures, 2015) In another New York case concerning sanctions the court ruled the parties had exhibited bad faith and levied sanctions against the CEO and the attorneys themselves for their bad behavior. (Arrowhead Capital Fin Ltd. V Seven Arts Entertainment, Inc, 2021)

In yet another similar case, Williams and 48 other employees of the defendant Angie’s list sued and stated they were owed substantial compensation for hours worked but not paid. The plaintiffs claimed they were instructed to underreport their overtime hours because many of those hours were for working at home. The plaintiffs sought information concerning background data automatically recorded on the defendant’s sales platform, Salesforce. The defendant claimed that the information sought was maintained by a third-party provider of service and further the defendant did not have possession, custody or control of the information. The court ruled that the defendant must provide the information and denied defendant’s motion to shift costs.

Although there are no cases yet that involve the failure of a party to preserve emojis, one can infer the results by reviewing In Sec.Alarm Fin.Enters., L.P. Alarm Protection Tech., the court found that the plaintiff was sanctioned pursuant to Rule 37€ as amended on December 1, 2015 for its failure to preserve relevant customer call recordings. The plaintiff argued the calls were lost as the result of the normal operation of a data retention policy. The court found that plaintiff should have known the potential relevance of the calls. The court further found reasonable means to preserve were available. (Sec.Alarm Fin Enters LP v Alarm Prot. Tech LLC, 2016)

Since at this point emojis have no set meanings and no set design for emojis allegedly meaning something specific like “happy,” it will be essential that the surrounding data, device used and meaning be recorded and presented to the opposing party. In another case, the plaintiff provided the electronic data that did not include metadata, summaries and screenshots of data. Defendants moved to compel real data. The plaintiffs argued they lost the information. The court maintained that plaintiffs should have preserved relevant information as soon as the article was published to which they objected. The defendants were allowed to present evidence at the trial of the destruction of metadata and the disabling of websites. The implication is clear that non-party essential people such as accountants, advertisers, and agents must be notified to preserve any emojis and their content in any potential case.

At the present time the only way to ensure that the appearance of the emojis both sent and received are available is by conducting a personal search for emojis. This task would be nearly impossible if it the business is not prepared. In short, litigation is happening now, and the volume of lawsuits is likely to explode as the use of emojis becomes more prolific. To avoid being caught unprepared organizations must face this issue immediately. There are two main issues for companies to consider: First, what is the proper use of emojis in the work place, and secondly, how will the use of emojis change data collection and the retrieval process required in litigation.



## IMPLICATIONS FOR BUSINESS AND CONCLUSIONS

Businesses and other organizations must decide whether emojis are ever acceptable for communication at work. If so, are there any restrictions as to their use? If emojis are acceptable, then what policies must a company address to protect itself from litigation in the areas of sexual harassment, other forms of harassment, workplace violence, defamation, discrimination and cultural misunderstanding? If emojis are allowed, must management decide on proper meanings of emojis. Should a company or other organization create a policy regarding which emojis are acceptable with specific intended interpretations? If a company outlaws the use of emojis at work, how will this ban be policed?

The second issue for a company is preparation for potential litigation. Are their policies or methods for the preservation, search and presentation of materials appropriate? Will the company need special procedures or rules? At the present time in no case has the outcome hinged on the use of emojis, but the likelihood of that prospect is increasing. The legal issues facing the courts includes the evidentiary importance of emojis. The courts do not have a definitive answer on the importance of emojis in lawsuits, but as attorneys continue to argue the meaning of emojis in any given lawsuit, a company may be surprised at a court's decision. In the cases mentioned above the decisions involving emojis are varied and sometimes inconsistent with one another.

As discussed above, the case law in this area just developing with most litigation not having advanced beyond the trial court level. Should a company be proactive and make policies about emojis or wait until the courts have defined the problem? What eDiscovery policies need to be in place so management will be able to comply when litigation occurs. If an emoji is added to electronic communication, the opposing party would want it and should have it under the discovery provisions of the Federal Rules of Civil Procedure.

Management must react to and resolve these issues before they become a runaway problem for the company. The easiest and safest solution is to ban all use of emojis in the business, but that is hardly a practical solution. That still leaves the issue of how can an organization monitor the usage, and if the rule is violated, what are the consequences for the user. Alternatively, management could agree on a limited number of emojis that are acceptable and agree on their meanings. The problems with that solution are first, will the courts decide the emojis meaning is what the recipient feels it means and not the sender? Will the emoji appear differently on the recipient's device, will the sender cleverly send harassing or threatening messages that appear negated by the use of an acceptable emoji?

In conclusion, if management agrees to a limited number of emojis that are acceptable, their use will have to be monitored as usage and meaning change in society. One day a peach might mean you are a "peach" and the next day it may represent something entirely different by the sender. Even if management resolves all of these issues and decides to allow employees to use emojis, there is still the real problem of storage and retrieval in litigation. A company could embed a number or label on all acceptable emojis to make retrievable easier, but that still ignores the problem of incoming emojis from outside the company, employees use of and monitoring of nonacceptable emojis, and the problem of emoji jumble where the emoji sent does not appear to the recipient the same way it appeared the sender. One reason to ban the use of emojis can be summed up by the findings of researchers at the University of Amsterdam who found that when people use emojis at work, others see them as less intelligent and less competent and only a little friendlier. (Gitlin, 2021)

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