

EMOJI-GOSH! How Emojis In Workplace Communications Can Spark A Lawsuit (Or Make It Harder To Defend One)

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Emojis. They are the colorful cartoon images that are built into nearly every mobile device. They are hugely popular. At this very moment, thousands of communications containing these images are bouncing off satellites. In fact, they are so prevalent that an emoji has taken the title of Oxford Dictionaries' "Word of the Year." Yes, you read that correctly. An emoji – not a word – was handed this year's title. Why should this craze be of interest to employers? Well, we will set the stage for a more in depth discussion by offering a couple scenarios: Todd's family and medical leave entitlement is due to expire tomorrow. The company's human resources manager decides to send Todd's supervisor a text message in order to discuss next steps. Here is the exchange: [Pic1](#) The company terminates Todd's employment two days later. Todd then files a lawsuit alleging violations of the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). A key piece of evidence in this lawsuit is the supervisor's response. Let's take a closer look at the response in order to find out why. According to Todd, the emoji combination was intended to mean "game over." Todd argues that this crude response proves that his supervisor harbors an unlawful animus towards those who take family and medical leave and those who are disabled. After all, instead of just responding "we should terminate Todd," the supervisor went out of his way to creatively combine some images to make the termination decision seem humorous. "Game over" is clearly unprofessional and not very sympathetic. It is a piece of "evidence" the company's lawyers will now have to try to explain away. But it gets worse. Todd also argues that the emoji combination conclusively establishes that the company had no plans to engage in the interactive process in order to determine whether a short extension of his leave would be a reasonable accommodation. Instead, the company took a very formulaic approach to the termination decision: leave expired + cannot return to work = automatic termination. Game over: There is no need to reach out to Todd to see when he might be able to return to work. The company's failure to engage in the interactive process is a big problem. This failure, however, is even more compelling in light of the supervisor's emoji combination. It's crude, unprofessional, and just doesn't look good. Here is another scenario: Mary files a complaint with human resources alleging that one of her co-workers is sexually harassing her. A human resources representative sends Mary's supervisor an email about the complaint. Here is the exchange: [Pic3](#) The supervisor drops the ball, fails to investigate and Mary ends up quitting a couple of weeks later. She then files a charge of discrimination and lawsuit alleging that she was subjected to unlawful sexual harassment. Again, a key piece of evidence is this email exchange. Mary argues that the "nail painting" emoji is frequently used as a way of saying: "don't care." Is Mary correct? Well, the Internet seems to think so. Here is a question posed to the Twitter community: "What does that paint your nails emoji mean?" Here is a response: "it's like 'I don't even have the time for you just gonna paint my nails instead cus it's more important.'" Why

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is this relevant? According to Mary, the emoji is evidence that her supervisor did not take the harassment and/or the investigation seriously. In hindsight, the human resources representative wishes she would have followed up to understand what the emoji meant. She would have conducted the investigation herself if she had known the supervisor was going to blow it off. The company's lawyers also wish the emoji was never used. The same email without the emoji would be far less damaging – making the lawsuit much easier to defend. **The Big Picture** At this point you probably know where this article is headed. People are increasingly using emoji as a means to express ideas, opinions and emotions. Of relevance here, one survey discovered that 76 percent of Americans admit to having used emoji combinations in workplace communications. This is a significant finding for employers. Why? Most employees have a pretty good filter when it comes to understanding what phrases are inappropriate for electronic communications. For example, most employees know that talking about an attractive intern, referring to a co-worker's disability or discussing the need to hire "new blood" could land the company in hot water. Communicating via emoji, however, is an entirely different story. By nature, emojis are used to communicate a concept in a vivid and humorous manner. Although using emojis can be fun, we all know humor can cloud even a superstar employee's judgment. This is especially true when it involves communicating via simple cartoon images readily available on most electronic devices. It just seems fun and harmless. So what's the bottom line? Communications containing emoji have more of a tendency to convey inappropriate content. For example, consider the following exchanges that utilize images readily available on most electronic devices: [capture7](#) [Capture3](#) [Capture4](#) Wow. Many employees wouldn't dream of sending a message talking about an attractive intern, making light of a disability or discussing the need to hire "new blood." But saying it with emojis was somehow acceptable to these employees. Why? Because many people view this sort of humor as creative and not really inappropriate. It's just a joke. Thousands of people are doing it. Even worse, many people aim to "one up" each other in order to create the most amusing content. Don't believe us? Take a look at BuzzFeed's "[23 Creative Emoji Masterpieces](#)." There are hundreds of articles like this one all over the Internet. They are all devoted to documenting people pushing the envelope when it comes to "emoji humor." This obviously cultivates a mind-set that inappropriate emoji are acceptable because they are both humorous and widely accepted as harmless. Why is the emoji craze relevant to employers? It's simple: Many employees have become accustomed to communicating via emoji in their personal lives. Since we're all creatures of habit, this routine will naturally spill over into workplace communications. What is acceptable in certain social networks, however, is often unacceptable in the workplace. Unfortunately for employers, "emoji humor" can inadvertently generate compelling evidence of discrimination or harassment. And a judge is not likely to buy into the "it's just an emoji" defense. The offensiveness of a message is not diminished by virtue of the fact it was delivered in a cartoon image. Even worse, a court or properly instructed jury will probably give this evidence more weight than words alone. Why? Because emojis are able to vividly communicate a concept. They are intended to have more of an impact than mere words. This content is therefore arguably more damaging from an evidentiary standpoint. As the saying goes, "a picture is worth a thousand words." There is another issue that is worth discussing: an emoji can also be cryptic. This is particularly problematic when it comes to workplace communications. Consider the following example: [Capture6](#) Fortunately for employers, explaining away an unintentional use of an emoji is easy. But what happens when the *true*

meaning of an emoji goes over the head of a supervisor reviewing the communication? Again, it's simple: the supervisor will have no reason to believe a violation of company policy occurred. The result is a convincing mosaic of evidence sitting around on company servers just waiting to be discovered and decoded for a judge or a jury. Here are a few examples:

[Capture7](#) "Pizza Sh!t." Translation: The new guy is apparently a "piece of Sh!t" in this employee's subjective view. But a supervisor looking at this message might not understand how employees truly feel about the new hire.

[Capture8](#) Translation: "Don't have time for your bull sh!t." Clearly there is some tension in this workplace. But a supervisor looking at this message might not understand its true extent before things escalate. [Capture8](#) "Not the brightest bulb." This employee apparently believes the new hire is not intelligent because an injury adversely affected his memory. But a supervisor looking at this message might not understand that it could be construed as evidence of an animus towards disabled people. [Capture11](#) Translation: "Hair of the dog." In other words, the employee is going to be drinking at lunch to alleviate a hangover. But a supervisor viewing this message might not understand that this employee is violating the company's alcohol and drug policy.

The Takeaway Should employers ban the use of emojis? No. That's not practical. The capability is built into nearly every mainstream electronic device. That would also not be great for employee morale. After all, everyone is doing it. And not all communications containing emojis are going to be inappropriate. Should employers scrutinize all electronic communications in order to determine whether messages are truly in compliance with company policy? No. That's not practical either. Nobody has time to do that while trying to run a business. This approach would also not be great for employee morale. So what *should* employers do? Well, for starters, it would be prudent to highlight the emoji craze and remind employees that all communications should be consistent with the company's EEO policy. Although fun, using emoji in workplace communications can be inappropriate and result in legal liability. Additionally, it might be worth giving communications a closer look if they contain cryptic emoji. After all, what may seem innocent or meaningless at first glance could amount to evidence of discrimination and/or harassment. When in doubt, just plug it into your search engine: [Capture9](#) [Capture10JPG](#) Ah, so that's what is really going on...

Again, the Internet provides all the answers. For more information, contact the author at ptschanz@btlaw.com.