

# No LOLing Matter: The Rising Prevalence of Emojis in Employment Litigation



**Given emojis' increasing prevalence in the workplace, employers and their counsel should familiarize themselves with the issues this newest form of communication can create.**

**By Michael J. Slocum | July 06, 2022 | New Jersey Law Journal**

Emojis have come a long way since the days when we winked at each other with a semicolon, dash, and parenthesis. The website [emojipedia.org](http://emojipedia.org) reports that as of September 2021, there were more than 3,600 unique emojis in the Unicode Standard. They fall into eight categories, including Smileys and People, Animals and Nature, Food and Drink, Activity, Travel and Places, Objects, Symbols, and Flags.

To the uninitiated, the diversity of emojis to choose from can be surprising. There are dozens of different faces beyond the standard smiley, such as Nauseated Face, Confounded Face, and Money-Mouth Face. There is Waving Hand, Raised Hand, and Vulcan Salute. A wide variety of foods, such as Pretzel, Hamburger, and Pizza, are available, as are emojis related to various events such as a birthday, a graduation, or a wedding.

More recently, emojis depicting a human or body part (such as faces, hands, or ears) are available in a variety of skin tones. There are emojis specific to a number of medical conditions, such as Ear with Hearing Aid, Deaf Person, or Breast-Feeding. Emojis of different genders sometimes exist for the same condition, such as Pregnant Woman, Pregnant Man, and Pregnant Person. Emojis that some may associate with

religious sects, such as Woman with Headscarf, Man Wearing Turban, and Person with Skullcap, are also there.

With this ever-expanding lexicon of emojis at employees' fingertips, it will surprise no savvy employer that the use—or alleged misuse—of emojis in the workplace is gaining prevalence in the litigation of harassment, discrimination, and other employment lawsuits. The shift to remote working accelerated by the COVID-19 pandemic, and the corresponding increase in employees communicating via email, online chat, and text messaging, is likely to only further fuel this trend.

Suppose, for example, that a male executive routinely has instant message conversations with his female assistant throughout the workday. Most of the exchanges deal with scheduling team meetings, arranging upcoming business travel, and the like. Every so often, however, the supervisor responds with a Winking Face or a Smirking Face. At what point might this behavior, even if his intentions are benign, cross a line into sexual harassment?

As another hypothetical, suppose a company is planning a reduction in force. During a virtual meeting between the operations team and human resources about which employees will be offered a severance package, several of the participants are having a separate instant message chat. As the employees in the decisional unit and their potential futures with the company are discussed, the participants in the chat are exchanging emojis such as Older Person, Woman Feeding Baby, or Man Fairy. Might this suggest possible discriminatory motives?

Courts across the nation have increasingly had to grapple with the issues these situations present. Among the issues courts routinely face are: (i) whether the emojis are admissible in evidence, (ii) what meaning should be ascribed to them, and (iii) whether expert testimony should have a role in interpreting emojis.

### **Is the Emoji Evidence Admissible?**

As a general proposition, in considering whether emojis are to be admitted into evidence, courts will look to the standard requirements of relevance and authentication, whether the emojis constitute hearsay, and if so whether there is an applicable exception, and whether their admission would not be prejudicial. This will, as with all evidentiary issues, generally turn on the facts of the case. Whether the emoji is part of a text exchange with the plaintiff who can authenticate the exchange, whether the emoji and the message its proponent offers it to prove have bearing on the outcome of the case—the answers will depend on the particulars of the case. Trial counsel should thus approach the admissibility of emojis just as one would the admissibility of any other written evidence.

### **What Message Was the Emoji Intended to Convey, and What Message Was Received?**

As with most aspects of human interaction, emojis can create communicative ambiguity and uncertainty. One emoji may mean different things to the person sending it and the person receiving it. For example, emojiopedia.org explains that Winking Face “may signal a joke, flirtation, hidden meaning, or general positivity” and cautions it is “not to be confused with the more mischievous or sexual Smirking Face.” Other emojis have acquired alternative “not safe for work” meanings. Depending on the context, for instance, Cherries, Peach, or Eggplant may refer to something other than fruits and vegetables. Interpreting the meaning of the emojis, and what a reasonable person would understand that meaning to be, is thus critical.

For example, the plaintiff in *Allen v. Ambu-Stat, LLC*, 16-cv-2848 (N.D. Ga. Dec. 6, 2017), alleged that she had been subjected to sexual harassment in the workplace. Among other things, the plaintiff offered

evidence that, when she told her supervisor that she would frequently drink chocolate milk after working out to assist her muscle recovery, her supervisor responded with “a text message saying that he liked chocolate milk and put ‘tongue emojis’ in the text.” Emojipedia.org notes that “because of its stuck-out tongue,” the Face with Tongue emoji “may be applied or interpreted in suggestive ways.” In *Allen*, however, the plaintiff admitted “that she brought up the issue of chocolate milk and suggested that [her supervisor] drink it.” The court therefore reasoned that “a reasonable jury could not conclude that [the supervisor’s] response to Plaintiff’s suggestion amounted to unwelcome harassment based on her sex.”

In another case, *Bishop v. City of Philadelphia*, 20-cv-3977 (E.D. Pa. Sep. 30, 2021), the plaintiff alleged that his employer, the Philadelphia Department of Prisons, had retaliated against him because his wife, a former employee of the Department, had settled a sexual harassment suit against the City. The Department, in response, pointed to the plaintiff’s online responses to posts other Department employees had made about an upcoming week of correctional officers’ appreciation events. Specifically, when one employee suggested boycotting the events because he did not feel genuinely appreciated, the plaintiff posted six Clapping Hands emojis and one Face with Monocle. Emojipedia.org explains that Clapping Hands “when used multiple times can be used as a round of applause.” Face with Monocle, meanwhile, “may show that someone is ... questioning something, sometimes with a sense of skeptical or ironic observation.” In response to another employee’s suggestion that “a rally would be nice,” the plaintiff posted two Fires, which emojipedia.org notes are “commonly used for various metaphorical expressions related to fire, including the slang ... lit (‘excellent’).” The court credited the Department’s position that it had disciplined the plaintiff because his “response of emojis demonstrated that [plaintiff] had knowledge of the planned job action [boycotting the officer appreciation events and/or holding a rally to air grievances about compensation]; chose not to intervene or transmit information; and instead showed support.”

As these and similar cases demonstrate, the particular meaning ascribed to the emoji can be paramount. Suppose, for example, that the supervisor’s use of Face with Tongue in *Allen* had been under other circumstances that would have allowed a reasonable jury to conclude it was meant to “be applied or interpreted in suggestive ways,” as emojipedia.org explains it may. The outcome of the employer’s summary judgment motion, and indeed perhaps an eventual trial, could have been much different.

### **Is Expert Testimony Necessary, or Even Proper?**

A final issue to consider is what role, if any, expert witnesses may play in dealing with emoji evidence. As a general proposition, courts will allow the introduction of expert testimony where the proposed witness possesses the requisite qualifications, has reliably applied the appropriate methodology to proper data in reaching his or her opinions, and the proffered opinion will help the jury or factfinder understand or interpret the evidence. But what role might an expert witness play in connection with proposed emoji evidence?

Start with the question of qualification. Disciplines such as linguistics and semiotics have long existed as recognized fields of scientific endeavor. One might argue that “emojiotics” could take its place as a related discipline. Of course, one might also be hard-pressed to find someone sufficiently schooled in “emojiotics” to qualify as an expert witness.

Turn next to issues of the helpfulness of the expert’s testimony. Given the various and nuanced meanings some emojis can have, and particularly the alternative “NSFW” meanings ascribed to certain emojis, a jury may well find it helpful to have someone explain the different things a particular emoji might mean. But the relevance of that testimony may depend on whether the individuals exchanging the emojis understood those meanings themselves, and their own testimony as to what they meant to convey or understood the emojis to suggest may be more pertinent than an expert’s discussion of what the emoji “could” mean.

The expansion of emojis during the past few years has been rapid, and new emojis are being proposed for addition to the lexicon all the time. Given emojis' increasing prevalence in the workplace, employers and their counsel should familiarize themselves with the issues this newest form of communication can create.

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