Do You Speak Emoji?

BY CAROL PAYNE AND TERAH MOXLEY

It all started with a 😊. Throw in a 🕺, 🕺, 🕺, 🕺, 🕺, and a ✌ and two would-be renters in Tel Aviv found themselves on the wrong side of a judgment in favor of a landlord who took a vacant apartment off the market based on enthusiastic text messages he received from the prospective tenants. After the emoji-loving couple flaked on renting the apartment, the landlord sued and recovered reliance damages after the judge determined that the symbols conveyed great optimism and misled the landlord into thinking everything was in order regarding the couple renting the apartment. *See Yaniv Dahan v. Nir Chaim Sacharoff, File No. 30823-08-16 Small Claims (Herzliya), Nevo* Legal Database (Isr.) (2017).

Over 10 billion emojis are sent each day. As emojis become ubiquitous in everyday communications, it should come as no surprise that emojis (and their more antiquated cousins, emoticons) are popping up with more frequency in lawsuits and criminal cases. However, courts differ in the ways they view emojis—as important or irrelevant.

For example, in a 2015 case, the United States Court for the Eastern District of Michigan determined that an emoticon—a "-D," which the court viewed as a wide open-mouth smile—"did not materially alter the meaning of a text message" included in an affidavit in support of a search warrant. Conversely, in a 2014 opinion from a Michigan appellate court, a similar emoticon—":P"—sank a defamation case brought by a public official. In that case, the public official sued several users of an online message board after a user posted a comment that appeared to accuse the official of corruption. The court concluded that the emoticon, a face with its tongue sticking out, denoted a joke or sarcasm, meaning the comment on the message board "on its face cannot be taken seriously as asserting a fact" and could not reasonably be viewed as defamatory.

Two practice areas that have seen emojis and emoticons used as evidence with increasing frequency are employment law and criminal law. On the criminal side, in what Pittsburgh prosecutors called a case of "emoji-cide," a text message with a trio of emojis depicting a man running, an explosion, and a gun helped police identify the sender of the message as a potential suspect instead of a victim.

Also, one of the more high-profile uses of emojis as evidence came during a 2015 trial involving Silk Road, an online black market. In that case, the federal district judge presiding over the trial sustained an objection by the defense after the prosecutor read text messages without mentioning smiley-face emojis contained in the messages. The judge instructed the jury that it should take note of any such symbols in the messages, explaining "that is part of the evidence of the document."

In the employment law context, emoticons have been successfully used by employers to win summary judgment and by employees to survive summary judgment. In 2014, a plaintiff asserting an FMLA retaliation claim survived summary judgment in a New Jersey case by relying on smiley-face emoticons in an email exchange between HR and the plaintiff's skip-level supervisor. In the email, the two discussed the plaintiff's termination, and the court concluded that a reasonable jury could find that the emoticons in the email were evidence that the employer was happy to be able to terminate the plaintiff because her FMLA leave was inconvenient. On the flip side, in several sexual harassment cases, employers have prevailed on summary judgment by pointing to smiley-face emoticons used by the plaintiffs in emails and self-assessments as evidence that the plaintiffs did not subjectively believe their working conditions were abusive.

So, what does all this mean? For one thing, employers should have strong electronic communications policies that explicitly cover symbols like emojis and emoticons (and even GIFs, hashtags, and memes). Second, litigators should carefully consider the evidentiary role emojis and emoticons might play as they evaluate the strengths and weaknesses of their cases.

One significant challenge—what does a particular emoji mean? We took a poll of our colleagues, asking them what they thought this emoji means—😒. Though dubbed the "unamused face" by Emojipedia, our office poll came up with a variety of answers, including exhaustion, disagreement, annoyance, disappointment, sadness, and skepticism. Couple this with the fact that different operating platforms sometimes display emojis differently, it can be a real challenge to establish the original, true intent of a specific symbol. So, emoji with caution. **HN**

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