

## High Five or Praying Hands: The Emoji Saga in the Digital Age Continues

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As emojis have continued to play an extensive role in how we communicate digitally, they have continued to create evidentiary issues for practitioners. As discussed in *Gone are the Days of the Tear-Stained Letter: Emojis as Evidence in the Digital Age*, emojis are often used as emotional cues, but, not surprisingly, individuals interpret the meanings and sentiment of emojis differently.<sup>1</sup> In fact, a 2016 research study found that individuals were unable to agree on the sentiment intended by a certain emoji twenty-five percent of the time.<sup>2</sup> For instance, researchers observed that when individuals received the "face with tears of joy" emoji—which Oxford Dictionaries previously declared its word of the year—some interpreted it positively, while others interpreted it negatively.<sup>3</sup> Emojis can also easily be misinterpreted upon receipt from the sender due to cross-platform variability issues.<sup>4</sup>

Regardless of these nuances, emojis continue to make their way into courts across the country. The Fourth Circuit recognized that a Facebook "like," illustrated with a "thumbs up" icon is a statement protected by the First Amendment.<sup>5</sup> In *Elonis v. United States*, the United States Supreme Court had the opportunity to address whether Facebook posts by a man threatening his ex-wife were protected free speech or "true threats," which do not merit First Amendment protection.<sup>6</sup> Among other arguments, *Elonis* maintained on appeal that specific posts were made in jest because the posts contained the "smiley face sticking its tongue out emoji."<sup>7</sup> Ultimately, the Court reversed *Elonis*' conviction without ruling on the constitutional issues.<sup>8</sup>

Emojis continue to play a significant, evolving evidentiary role in the criminal context.<sup>9</sup> In fact, the United States District Court for the District of Connecticut permitted an agent with the U.S. Department Alcohol, Tobacco, Firearms, and Explosives to rely on his training to interpret emojis to establish probable cause.<sup>10</sup> Emojis are beginning to be addressed more frequently in civil cases—especially in the employment litigation context. The Northern District of Alabama recently analyzed emojis as evidence that were used in text messages between an employee and employer in *Murdoch v. Medjet Assistance*.<sup>11</sup> The United States District Court for the District of New Jersey held that an employee can use an emoji to demonstrate pre-text.<sup>12</sup> Conversely, emojis have also been deemed useful evidence for employers as well. In *Arnold v. Reliant Bank*, the Middle District of Tennessee granted an employer's dispositive motion on an employee's hostile work environment claim because, in part, the employee used a smiley face emoticon in her performance review.<sup>13</sup>

Likewise, in *Mooneyhan v. Telecomms. Mgmt.*, the Eastern District of Missouri granted an employer's dispositive motion on an employee's hostile work environment claim.<sup>14</sup> In doing so, the court reasoned that the employee's emails to management with smiley face emoticons around the same time she was allegedly harassed severely "undermine[d] her claim that she subjectively believe[d] that her working conditions were abusive."<sup>15</sup> However, the United States District Court for the District of Minnesota held that "[t]he use of [a sad face] emoji [did] not provide a specific link between the alleged discriminatory animus and the challenged decision or

evidence of a discriminatory attitude.”<sup>16</sup> Last, in *Stewart v. Durham*, the court granted an employer’s dispositive motion related to an employee’s claims for intentional and negligent infliction of emotional distress.<sup>17</sup> The court reasoned that although the employee’s supervisor sent her a picture of a “tumescent penis,” the employee responded to the text message, with among other things, emojis blowing kisses and winking, which undercut the employee’s claims.<sup>18</sup>

How should defense counsel and employers respond to the impact of emojis in the workplace? First, anti-harassment policies should be broad enough to encompass emojis. If not, it may be time to amend or change the policy at issue. As best practice, employers should be wary about using emojis when communicating with their subordinates. Emojis certainly should not be used by employers when discussing employment decisions. When investigating a workplace complaint, employers should analyze all emojis used in the communication at issue. Specifically, employers need to pay attention to the emotional cues and meanings behind the specific emojis.<sup>19</sup>

Outside of the employment context, emojis have made their way into intellectual property litigation.<sup>20</sup> The Northern District of Georgia recently analyzed the “thumbs’ up emoji” as evidence in a contract case.<sup>21</sup> In doing so, the court reasoned there was a disputed fact as to whether there was waiver of breach of contract when the parties “exchanged text messages in which Daniel inquired whether Sewell was prepared to purchase; Sewell responded affirmatively; Daniel replied with a thumbs' up emoji; and Daniel then requested a purchase contract from Sewell after the option had expired.”<sup>22</sup> Emoji use by attorneys has also been the subject of recent civil litigation. In *In re Oladiran*, an Arizona attorney faced disbarment after several disciplinary charges, which included filing frivolous lawsuits against four federal judges.<sup>23</sup> In one of the lawsuits, attorney Oladiran alleged Judge Bolton of conspiracy.<sup>24</sup> This specific pleading gained national attention on *Abovethelaw.com* and was described as a “lesson on how not to address the court.”<sup>25</sup> Attorney Oladiran was ridiculed for his “frustration” with Judge Bolton and his use of the “most menacing smiley emoticon ever.”<sup>26</sup>

Effectively presenting emojis to a jury and preserving emojis in a court record are still evolving issues. Because emojis are most often used to enhance ordinary text, one must assign the meanings of certain emojis in the context of a complete message (text and visual icons). Therefore, if feasible, use the entire text message, email, or social media post, displaying the text and emojis together when publishing and preserving emojis, which has been done in some instances.<sup>27</sup> Doing so will help avoid disputes concerning emoji misinterpretation and will best ensure that the full intent of the communication is conveyed to the jury. If including an image is not possible, it is imperative that the written description of the emojis be as complete and accurate as possible, preferably by using the standardized Unicode names.<sup>28</sup> There are over 100 emojis in the “Smileys and Emotion” category alone. Therefore, an imprecise description like “smiley face emoji” could lead to jury confusion or error. In addition to its distinctive name, every emoji also has a unique code assigned to it. Including both the full name and the code in the description will ensure that “sleepy face” (😴, U+1 F62A) is not incorrectly construed as “drooling face” (🤤, U+1 F924).<sup>29</sup>

While least desirable, emojis can be omitted entirely or replaced with a generic placeholder in brackets, such as, [*emojis omitted*] or [*various emojis*]. However, these options will not accurately communicate the full meaning of the statement at issue.<sup>30</sup> The “Silk Road” trial demonstrates the complexities of omitting emojis entirely.<sup>31</sup> In this case, the prosecution was to read into evidence emails and chat logs containing statements made by Ulbricht but to make no mention of emoji that were included in them.<sup>32</sup> Defense counsel objected to the omission and argued that because text messages and emoji “are designed to be absorbed through reading, not through hearing,” the jury should be allowed to read them.<sup>33</sup> This resulted in the prosecution later saying the word “emoticon” when verbally referring to the emojis and emoticons that appeared in emails and chat conversations without verbally describing the emojis or explaining their purported meanings.<sup>34</sup> Judge Forrest ultimately held that the messages could be read in court, although she also instructed the jury there was no indication the messages had been communicated orally.<sup>35</sup> Despite these issues, some practitioners still ignore the presence of emojis in digital communications, which is problematic.<sup>36</sup>

It is no secret that emojis have continued to infiltrate digital communications. And, as they continue to infiltrate digital communications, emojis have permeated criminal cases and are making their way into civil litigation. As a result, evidentiary challenges have followed and remain unresolved. Therefore, practitioners must remain aware of these developments and challenges as the digital age continues to expand.

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<sup>1</sup> Ashley L. Crank, *Gone are the Days of the Tear-Stained Letter: Emojis as Evidence in the Digital Age*, ALABAMA DEFENSE LAWYERS ASSOCIATION, Vol. 34, No. 2 (Fall 2018).

<sup>2</sup> Eyder Peralta, *Lost in Translation: Study Finds Interpretation of Emojis Can Vary Widely, The Two-Way*, NPR (Apr. 12, 2016) [https://www.npr.org/sections/thetwo-way/2016/04/12/473965971/lost-in-translation-study-finds-interpretation-of-emojis-can-vary-widely?utm\\_source=facebook.com&utm\\_medium=social&utm\\_campaign=npr&utm\\_term=nprnews&utm\\_content=20160412?utm\\_source=facebook.com&utm\\_medium=social&utm\\_campaign=npr&utm\\_term=nprnews&utm\\_content=20160412](https://www.npr.org/sections/thetwo-way/2016/04/12/473965971/lost-in-translation-study-finds-interpretation-of-emojis-can-vary-widely?utm_source=facebook.com&utm_medium=social&utm_campaign=npr&utm_term=nprnews&utm_content=20160412?utm_source=facebook.com&utm_medium=social&utm_campaign=npr&utm_term=nprnews&utm_content=20160412).

<sup>3</sup> *Id.*

<sup>4</sup> See Crank, *supra* note 1; see also Lyrissa Barnett Lidsky & Linda Riedemann Norbut, *#I U: Considering the Context of Online Threats*, 106 CALIF. L. REV. 1885, 1908 (2018) (explaining that the gun emoji in the article's title "looks like a space pistol on some platforms and like a revolver on others"); Alex Hern, *Why are Samsung's Emojis Different from Everyone Else?*, GUARDIAN (Sept. 6, 2017), <https://www.theguardian.com/technology/2017/sep/06/why-are-samsung-emojis-different-from-everyone-else> (discussing the difficulties Apple users have in exchanging emojis with Samsung users).

<sup>5</sup> *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013) (“In sum, liking a political candidate's campaign page communicates the user's approval of the candidate and supports the campaign by associating the user with it. In this way, it is the Internet equivalent of displaying a political sign in one's front yard, which the Supreme Court has held is substantive speech.”).

<sup>6</sup> *Elonis v. United States*, 135 S. Ct. 2001, 2005-08 (2015).

<sup>7</sup> *United States v. Elonis*, 730 F.3d 324, 331 (3d Cir. 2013); see also Petition for Writ of Certiorari, at 8, *Elonis v. United States*, 135 S. Ct. 2001 (No. 13-983) (“Petitioner responded that his son ‘should dress up as matricide for Halloween,’ adding, ‘I don’t know what his costume would entail though. Maybe [petitioner’s wife’s] head on a stick?’ Petitioner ended the post with an ‘emoticon’ of a face sticking its tongue out, which he understood to be an indication a post is meant in ‘jest.’”) (internal citations omitted).

<sup>8</sup> *Elonis*, 135 S. Ct. at 2012.

<sup>9</sup> See, e.g., *United States v. Jefferson*, 911 F.3d 1290, 1305 (10th Cir. 2018) (affirming defendant’s robbery convictions, and noting that the “substantial” evidence of his guilt included not only surveillance videos and his

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admissions, but also a “Facebook post made after the January 9 robberies, which included a firearm emoji”), *judgment vacated and case remanded*, *Jefferson v. United States*, 140 S. Ct. 861 (2020); *State v. Harwood*, No. 19-034, 2020 VT LEXIS 70, at \*3 (Vt. 2020) (holding verbal statements constitute threatening conduct in aggravated domestic assault with a weapon case after defendant’s girlfriend reported receiving various messages on Facebook, some of which included “gun emojis”); *Commonwealth v. Hunt*, No. 18-P-106, 2019 Mass. App. Unpub. LEXIS 142, at \*7 n.4 (Mass. App. Ct. 2019) (unpublished) (analyzing evidence on cross-examination to show nature of relationship and alleged bias of witness included text messages with “three kissey emoji,” “emoji of ... two people with [a] heart ... above their heads” and an “emoji of ... [a] diamond ring”).

<sup>10</sup> *United States v. Westley*, No. 3:17-CR-171, 2018 U.S. Dist. LEXIS 118571, at \*27 (D. Conn. 2018) (permitting the use of agent’s affidavit to establish probable cause wherein he testified that a “cloud” emoji in a posting referred to drugs and a “gas” emoji in a defendant’s text messages symbolized “gang.”).

<sup>11</sup> *Murdoch v. Medjet Assistance*, 294 F. Supp. 3d 1242, 1253-55 (N.D. Ala. 2018).

<sup>12</sup> *Apatoff v. Munich Re Am. Servs.*, No. 11-7570, 2014 U.S. Dist. LEXIS 106665, at \*35 (D.N.J. Aug. 1, 2014) (“The Court believes that a reasonable jury could find that the ‘emoticons,’ attached to the emails of two Munich Re managers late in the day on which Plaintiff was terminated, are evidence that the decisionmakers at Munich Re were happy to be able to terminate Plaintiff.”).

<sup>13</sup> *Arnold v. Reliant Bank*, 932 F. Supp. 2d 840, 845-55 (M.D. Tenn. 2013).

<sup>14</sup> *Mooneyhan v. Telecomms. Mgmt.*, No. 1:16 CV 118, 2017 U.S. Dist. LEXIS 188743, at \*32-34 (E.D. Mo. Nov. 15, 2017).

<sup>15</sup> *Id.* at \*33.

<sup>16</sup> *Dragonite v. South Lake Clinic, P.A.*, No. 17-3785, 2019 U.S. Dist. LEXIS 171087, \*25 (D. Minn. Oct. 2, 2019).

<sup>17</sup> *Stewart v. Durham*, No. 3:16-CV-744-CWR-LRA, 2017 U.S. Dist. LEXIS 88656, at \*2-3 (S.D. Miss. June 9, 2017).

<sup>18</sup> *Id.*

<sup>19</sup> *See, e.g., Bellisle v. Landmark Med. Ctr.*, 207 F. Supp. 3d 153, 160 (D.R.I. 2016) (“The messages included a string of scissor emoji’s that Ms. Bellisle indicates is a lesbian symbol.”); *See Paul E. Madlock & David Westerman, Hurtful Cyber-Teasing and Violence: Who’s Laughing Out Loud?*, 26 J. INTERPERSONAL VIOLENCE 3542, 3552 (2011) (identifying the smiley and wink emojis as “redressive communication behaviors that perpetrators [of cyberbullying] used to mitigate the hurtfulness of the cyber-tease”).

<sup>20</sup> *See, e.g., Apple Inc. v. Princeps Interface Techs.*, No. 19-cv-06352, 2020 U.S. Dist. LEXIS 52787, at \*8-10 (N.D. Cal. Mar. 26, 2020).

<sup>21</sup> *Sewell v. Daniel*, No. 1:19-cv-5790-TCB, 2020 U.S. Dist. LEXIS 63609, at \*2 (N.D. Ga. March 4, 2020).

<sup>22</sup> *Id.* at \*5.

<sup>23</sup> *In re Oladiran*, No. MC-10-0025-PHX-DGC, 2010 U.S. Dist. LEXIS 106385, at \*8 (D. Az. Sept. 21, 2010).

<sup>24</sup> *In re Oladiran*, 2010 U.S. Dist. LEXIS 106385, at \*8.

<sup>25</sup> Kashmir Hill, *Taj Oladiran’s ‘Motion of the Year’ Earns Him Sanctions*, ABOVE THE LAW (Oct. 11, 2010) <https://abovethelaw.com/2010/10/taj-oladirans-motion-of-the-year-earns-him-sanctions>.

<sup>26</sup> Hill, *supra* note 25 (“Finally, to Susan Bolton, we shall meet again you know where. ”); *In re Oladiran*, 2010 U.S. Dist. LEXIS 106385, at \*8 n.1.

<sup>27</sup> *See, e.g., Ukwuachu v. State*, No. PD-0366-17, 2018 Tex. Crim. App. Unpub. LEXIS 442, at \*19 n.12 (Tex. Crim. App. June 6, 2018) (discussing the admissibility of text messages, including an emoji).

<sup>28</sup> Unicode, <https://home.unicode.org> (last visited Aug. 5, 2020).

<sup>29</sup> *But see Moe’s Home Collection, Inc. v. Davis St. Mercantile*, No. 05-19-00925-CV, 2020, Tex. App. LEXIS 4951, at \*8 (Tex. App. Ct. July 6, 2020) (analyzing, among other things, a party’s statement “Got it!! [heart emoji, apparently added by Pierik]” for purposes of a contract case).

<sup>30</sup> *See, e.g., United States v. Johnson*, 280 F. Supp. 3d 772, 773 (D. Md. Nov. 21, 2017) (referencing an Instagram post where defendant wrote “[t]hey welcomed me home like it was 88 [emojis]. Real luv never fails. . .”).

<sup>31</sup> *See United States v. Ulbricht*, 31 F. Supp. 3d 540 (S.D.N.Y. July 9, 2014) (denying defendant’s motion to dismiss his indictment stemming from the creation, administration, and operations of an online marketplace known as “Silk Road”).

<sup>32</sup> *See Benjamin Weiser, At Silk Road Trial, Lawyers Fight to Include Evidence They Call Vital: Emoji*, THE NEW YORK TIMES (Jan. 28, 2015) <https://www.nytimes.com/2015/01/29/nyregion/trial-silk-road-online-black-market-debating-emojis.html>; Madison Margolin, *Emojis in Court Evidence*, MEDIUM (Mar. 26, 2015), <https://medium.com/@margolinmadison/emojis-in-court-evidence -557eadb5758a> (“[D]uring the Federal District

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Court trial of Ross Ulbricht, . . . , a prosecuting attorney sparked debate when he failed to mention the presence of a smiling emoji at the end of an Internet post he read aloud to the jury[.]”).

<sup>33</sup> *Id.*

<sup>34</sup> See Karen Henry & Jason Harrow, *Exhibit A - Winky Face: Emoticon Evidence Enters Courts*, LAW360 (Nov. 17, 2015), <https://www.law360.com/articles/727700/courts-begin-considering-emoticon-and-emoji-evidence> (“[T]he prosecution apparently did not describe the actual symbol or attempt to convey its intended meaning.”).

<sup>35</sup> Weiser, *supra* note 31 (“The jury should read them,” the judge said. “They are meant to be read. The jury should note the punctuation and emoticons.”).

<sup>36</sup> See, e.g., *United States v. Dadona*, No. ACM 39202, 2018 CCA LEXIS 325, at \*3 n.3 (A.F. Ct. Crim. App. July 2, 2018) (“This opinion quotes [] messages as they appear in prosecution exhibits except for ‘emojis’ or ‘emoticons’ . . .”).