**(Emojis)**

## … and Other Acts of Cyber-Harassment

Technology has dramatically changed the way we communicate in both our personal and professional lives. Over 10 years ago, a Pew Research Center study found that 86 percent of working Americans use the internet or email, 81 percent use a personal or work email account, and 89 percent own a cell phone. You can be sure those numbers have only increased since then.

Facebook recently claimed more than 2.13 billion monthly active users and 1.4 billion daily active users. Nearly every month, the Instagram and Twitter platforms see an increase in their use. In fact, while email remains the preferred means of business communications, social networking platforms – think Facebook, Instagram, Twitter, Snap Chat, LinkedIn, MeettheBoss, Glassdoor, even instant messaging and blogging (of all varieties) – easily exceed email use.

This technology phenomenon presents unique challenges almost daily for employers concerned with preventing unlawful harassment in the workplace. The sheer range of potentially cyber-harassing behavior can be unimaginably broad: from a single private (and temporary) photo sent via Snap Chat, on one end of the spectrum; to a blog post potentially viewed and shared by millions (going "viral") at the other end. And the very hallmark of social media – it's immediate interactivity – is the feature presenting the greatest risk for employers.

Here is the unadorned reality: Employees can and do send and receive an astounding number of inappropriate comments, videos, or pictures about their coworkers on a seemingly endless variety of social media and email platforms. They can and do repeatedly urge coworkers to become "friends" on social networks. They chat, they text and they message one another throughout the day – it bears repeating: *throughout the day*. And their employers may be liable for any coworker harassment occurring in that realm when they know or should have known of harassment and fail to take prompt and appropriate action to stop it.

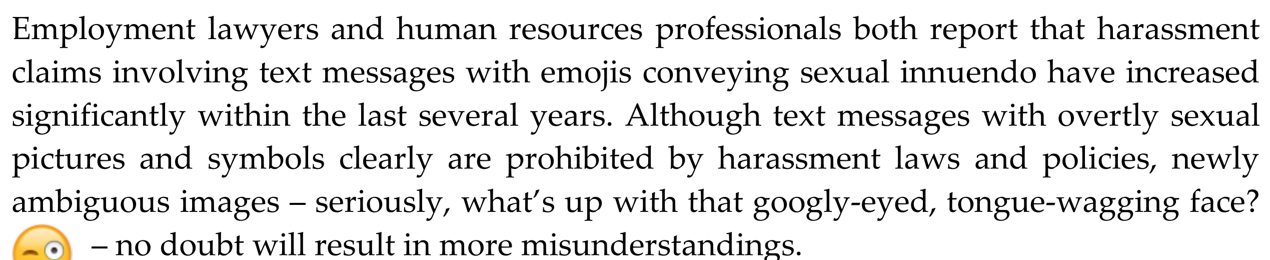
A federal district court recently heard a case where a black employee posted a photo of a work-related golf outing on Facebook and then commented on her photo: "[r]emind me that taking pictures in the shade is really a disservice to my wonderful chocolate skin." One of her coworkers responded by commenting: "That is why you always have to smile!" She told her supervisor that she found the comment racially offensive and,

unhappy with the employer's response, eventually filed a lawsuit alleging a hostile work environment. Fortunately for the employer, the judge found that it was not liable for the alleged harassment because it immediately investigated the employee's allegation and promptly instructed its information-technology contractor to block access to Facebook for all its office computers!

However, in harassment suits, the social networking of both the alleged harasser as well as the harassee can become an issue. The harassed employee's use of social networking can be relevant to whether he or she welcomed the alleged conduct. And if the employee claims emotional damages from the harassment, his or her social media activity might also be used to determine the employee's emotional state.

A federal district court in Indiana recently ordered the Equal Employment Opportunity Commission to produce profiles, postings, messages, and applications from several plaintiffs' MySpace and Facebook profiles because the judge found they may be relevant to the their emotional or mental state during the time of the alleged harassment from their supervisor. Addressing privacy concerns, the court noted that locking a profile from public access does not prevent it from being used in litigation: "It is reasonable to expect severe emotional or mental injury to manifest itself in some … social network site … content, and an examination of that content might reveal whether onset occurred, when, and the degree of distress."

One of the latest developments in social media and harassment is the use of emojis. Emojis are those small digital images or icons used to express an idea, emotion, opinion, gesture, and reaction – literally anything that might be communicated can be reduced to an emoji. That's right, they aren't just about smiley faces anymore. And they aren't just for personal use either; they're finding their way into workplace communications and increasingly used to convey ever more substantive and nuanced messages. A 2017 research study out of the Santa Clara University School of Law found 80 court opinions that involved emojis – and about half of them occurred in the last two years.

Employment lawyers and human resources professionals both report that harassment claims involving text messages with emojis conveying sexual innuendo have increased significantly within the last several years. Although text messages with overtly sexual pictures and symbols clearly are prohibited by harassment laws and policies, newly ambiguous images – seriously, what's up with that googly-eyed, tongue-wagging face?  – no doubt will result in more misunderstandings.

Yet another federal district court recently heard a case where a female job applicant sued an employer for sexual harassment because one of its employees sent the applicant an

obscene picture requesting sexual favors in exchange for a job interview. The judge, however, dismissed the suit, finding that the applicant's response to the employee's request – which included a "blowing kiss" emoji and a "winking" emoji – not only *suggested* that she welcomed the invitation, but left *no other reasonable conclusion* than that is what she did. Similarly, in 2015, a student at Western New England University brought a claim against the university, claiming that he had been wrongfully accused of sexual misconduct and cited his accuser's "positive emojis" as evidence of their mutual consent. Any case of this nature has the potential of putting an employer in a "bet the company" lawsuit. Maybe you win, maybe you don't. But they illustrate the increasing risk for employer liability in a culture where two things are certain: technological innovation and an expanding view of harassment. Employers simply cannot ignore the fact that their employees are using emojis at work and this activity will lead to more legal disputes.

What's a pro-active employer to do? Put strong electronic communications policies in place and make sure they incorporate their anti-harassment and anti-discrimination policies. Review their handbooks and policy manuals to ensure their anti-harassment language includes the use of text messages and symbols that convey inappropriate, harassing, or offensive communications. And finally, make manager and supervisor training a top priority so these employees know how to recognize harassment issues and understand how to escalate them properly.

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