

Emoji-Awareness in Law

By [Amanda Ciccatelli](#) September 7, 2017

Is that winky-face or heart eye emoji considered friendly or flirtatious at your office? Emojis have created a tricky new area of employment law that attorneys now must face. In fact, employment attorneys might even want to think about setting up emoji-awareness seminars for companies on how emoji and apps are creating new conflicts in the workplace.

Leigh Goddard, partner at McDonald Carano, recently sat down with Inside Counsel to discuss the legal implications of emoji use in the workplace. Goddard practices in commercial and complex litigation, employment & labor law, and trust & estate law. Her representation covers all aspects of litigation, from investigation through filing of initial pleadings, discovery, and motion practice, to trial.

Companies do not necessarily need to set up emoji-awareness seminars,” she explained. “Rather, they should insist that employees remain professional in their communication style so that the meaning of the communication is not misconstrued. Existing harassment and discrimination policies likely already cover emoji and emoticons, but it would be wise for companies to provide additional examples in their handbooks and trainings regarding the use of emoji.”

For example, applications like Slack are electronic communications platforms designed to facilitate discussions among team members. These platforms are no different from existing systems, including email, message boards, Instagram, Facebook and more. Emoji should typically not be used in professional communications and can alter the meaning or intent of communications. According to Goddard, as with any other form of electronic communication, humor, sarcasm or intent can be misconstrued, and this is no different when emojis are used in communications are used in communications with co-workers.

Is the use of emojis like the winky-face emoji considered sexual harassment? Per Goddard, as with all allegations of sexual harassment, one would need to consider the entirety of the evidence. “An emoji could potentially be construed as offensive to the recipient of the communication, depending upon the nature of the communication, the working or social relationship of the parties, and the history of their communications,” she explained. “The challenge with emoji and emoticons in professional communications is that they can be misconstrued or can be read to alter the meaning of the communication.”

There are some cases in where some of the evidence involves electronic communications with emoticons or emojis. For example, in *Kara v. Ohio Dept. of Taxation*, the employee alleged that he had been wrongfully terminated. One piece of evidence involved email communication with an emoticon. While the court noted that the use of emoticon “may have been unprofessional and immature” the opinions expressed in the communication did not rise to the level of malice, bad faith or reckless conduct. Another first amendment case, *Enjaian v. Schlissel*, included an electronic communication with an emoticon. There, the court noted that the intent of the communication may or may not be altered by the inclusion of a wide-open mouth smile emoticon.

So, how can employees and employers protect themselves from this?

According to Goddard, employers and employees can protect themselves from emoji-based communications harassment by having policies regarding professional communications and training employees about how the use of emojis can potentially alter the intent of the communication such that the communication may be deemed offensive or harassing to the recipient.

She said, "Training is often the key to avoid such claims."