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TRENDS

Are Your Emojis Dangerous? Did you know that July 17th was World Emoji Day? Emojis in workplace communication are complicating employment litigation.

Emoji use is increasing. They are fun, cute, and expressive, but, like many other symbols, can be subject to differing interpretations. People already put different spins on a simple word in a sentence and debate whether a comma changes a sentence's legal effect. Emojis are even more open to misinterpretation and argument. They increasingly creep into work emails, memos, and letters, which then become Exhibits in litigation. Was that smiley face 😀 actually friendly, or was it sarcastic? Was an emoji intended to be loving, intimidating, or harassing? 😘 Or discriminatory? Did it turn a serious topic into a "joke" and indicate that HR really did not mean what the words of the email said? 🤡 All of these issues, and more, are cropping up and complicating litigation. It is hard enough to explain the wording of your email to a jury a couple of years after the fact; it can be tougher to explain the emotion behind a "yuck" 🤢, gritted teeth 😬 (Anger? Frustration? Rage? Embarrassed? What?), or, heaven forbid, a poop emoji which is now on Exhibit A. It may be wise for managers to avoid trying to be too cute, trendy, or casual in communications with employees. (And OMG, watch your use of acronyms, too.)

LITIGATION

The Price of Litigation

Wage Battle Grinds on for 13 Years and Finally Results in $9 Million Settlement. Litigation is never easy. It is lengthy, complex, expensive, and can exhaust the time, energy, and resources of the parties. Be very careful before getting locked into a case because, just like catching a tiger by the tail, it may be difficult to let go (for

years). This is illustrated by *Hill v. Xerox Business Services, LLC* (W.D. WA, 2025), an FLSA and state law Wage and Hour class action suit filed 13 years ago by 5,700 call center employees who claimed the company's pay plan did not accurately cover their minimum wage and overtime wages. The case yo-yoed up and down in both the state and federal courts, with appeals, new decisions, more appeals, etc., for 13 exhausting years. Finally, the parties agreed to stop the rollercoaster and reach a $9 million settlement. Most of the money goes to 4,771 employees who are still at Xerox, and 965 now departed employees will receive about 10%. This, of course, is not the only cost. Xerox had to spend additional millions on its own legal fees, costs, and administrative time and expense to fight so long in so many proceedings only to settle in the end. The lesson of this case is not about the specific wage and hour issues, but instead about the costs and problems of getting into prolonged litigation. Before deciding to let the courts decide the issue, carefully consider whether negotiation and resolution **now** is wiser, before getting locked in.

Personal Liability

Company is Dismissed from Case, But Human Resource Managers are Each Found Personally Liable for $50,000. A Safety Nurse at a food processing company alleged that she had been asked to come to an HR Manager's house after work to discuss a work-related issue. On arrival, she found two of the company's HR Managers present. They offered drinks, then made sexual propositions, and then started touching her breasts and pressing their bodies against her, and kept up pressure to get a sexual encounter. She managed to leave the house. However, the two managers soon after allegedly got her in a room at work and tried again. She resigned and filed a Title VII complaint against the company and state tort claims against the two managers personally for invasion of privacy, assault and battery, emotional distress, and outrage. A court found the two managers were acting outside the scope of their company roles and found the company not liable. The Appeals Court upheld this ruling, so the company was out of the liability picture. However, a jury found both HR Managers personally liable for $50,000 for the assault and battery claims, plus associated costs. The Appellate Court upheld these personal awards against the two HR Managers. *Gray v. Koch Foods, et al* (11th Cir. 2025)

Discrimination

"Validity" means based on sound principles. Employment decisions should be based on valid assessment criteria that are "job-related and consistent with business needs." The following two cases show how valid criteria can win a case, or how

the use of criteria lacking solid validity can show "pretext" and bias and destroy one's defense.

Validated Process Defeats Discrimination Case. A 58- year-old Black female Federal Aviation Administration employee, Ms. Pilot, did not get the promotion to Air Traffic Manager at the Kansas City Airport. She had over 30 years of experience, an excellent record, and was serving as the Acting Manager. She was included as one of the finalists among other ATF Managers from around the country. However, a younger White man was chosen. She filed a discrimination case challenging the selection and alleged that her supervisor had not wanted her in the role due to her age, race, sex, and having filed a prior complaint against him. The court reviewed the evidence and granted summary judgment dismissing the case. The Court of Appeals upheld the dismissal. The evidence showed that the accused manager had not influenced the hiring process. The promotion criteria and interview questions had been selected from a standard ATF national list that had been validated for job-relatedness. The selection committee was composed of ATF managers from around the US, not her local manager. They did not know the applicants. Three top candidates were to be chosen for final interviews. Ms. Pilot scored fourth on the screening tests. However, when the selection committee learned she was the Acting Manager for the position, it decided she should be interviewed, altering the process in her favor, to interview four people. The committee found she did not score as highly on the interview as others, especially in the area of labor relations knowledge, which is important for the Manager position. Though "younger," the successful candidate was 54 years old, which the Age Discrimination In Employment Act generally considers to be "substantially the same age" as 58. There were no indications of any bias in the process, except in Ms. Pilot's favor, by including her as a finalist. The use of a standardized, pre-validated process provided the basis for the ATF to win dismissal. **This case is a lesson** in the importance of carefully planning hiring and promotion processes and validating the criteria to be used. [For more detailed information, request the articles Validity or The Hiring Process by Boardman Clark]

Triple Pretext and Non-Job- Related Criteria. Rarely do so many factors add up to defeat an employer's defense to a case. This situation includes contradictory evaluations, use of invalid assessment criteria, creating after-the-fact justifications, and a history of biased statements. A Logistics Clerk, Ms. Hayes, with 25 years of experience, was the only woman in the five-person Shipping/Receiving unit. The company decided to lay off one clerk. The Plant Manager sent Human Resources a Lay Off Notice to give to Ms. Hayes. HR replied by questioning why she was being laid off while a less senior person was kept. HR asked for an evaluation of the reasons. The Plant Manager then conducted an assessment and gave Ms. Hayes the

lowest performance score in the unit, claiming she needed more training in the SAP receiving system, could not operate a forklift, and the male employee he wished to keep had factory production experience. So, Ms. Hayes was laid off. She filed a Title VII sex discrimination suit claiming that less senior and less qualified men were retained. The court found sufficient evidence of pretext to support a sex discrimination case. Only a couple of weeks prior to the Plant Manager's recommendation, on Ms. Hayes' annual evaluation, her direct supervisor gave her the **highest** rating in the unit with excellent performance and technical skills. The less senior male clerk, who was not laid off, had lower ratings and specific notations of his need to improve SAP system knowledge. It turns out that Ms. Hayes had also obtained a forklift license. Further, the court found that neither factory production experience nor forklift operation were tangibly job-related to the Clerk position. So, the Plant Manager's evaluation was on elements that lacked validity for that particular job. It looked like he had tried to find criteria he could give her a low mark on, while ignoring the most job-related factors. The Plant Manager had already made up his mind before doing any "assessment," and his low evaluation appeared to be an after-the-fact pretextual effort to justify an already-made decision and was in contradiction of the excellent evaluation by the direct supervisor who had the most knowledge of people's performance. Finally, there was evidence that Senior Managers had made negative comments about women in the workplace and ignored concerns raised by female employees, which could further support a sex discrimination claim. *Hayes v. Clariant Plastics & Coatings INC* (6th Cir. 2025)

Disability

Direct Threat Requires Individual Assessment. Under the ADA, a person can be denied a job or removed from a job if they constitute a *Direct Threat* to the health or safety of themselves or others. There are specific ADA standards for establishing a Direct Threat. *EEOC v. Drivers Management LLC, Werner Enterprises INC* (D. NE, 2025) involved a deaf applicant for an over-the-road commercial semi-driving position. Federal rules require CDL drivers to meet hearing requirements for traffic safety reasons. However, the rules also allow for certain medical variances. The applicant, Mr. Robinson, obtained a variance. He enrolled in and passed a driver's training school, with the accommodation of an interpreter in the backseat. He then applied for a "Placement Driver position," which required several weeks of open road driving with a trainer present. He was rejected due to his deafness being a *Direct Threat* to safety. He filed a disability complaint, and the EEOC sued on his behalf. In defense, the company's HR Director said she had done research on potential accommodations before the rejection. However, she had no documentation of any research. Even if that had been done, no one actually talked to Robinson or engaged in any practical or medical evaluation of him or the degree of or effect of his hearing

loss. The rejection was simply based on the general fact that he had the condition of being deaf. A jury awarded Robinson $112,000 in compensatory damages plus the statutory maximum of $300,000 in punitive damages. On appeal, the court upheld the verdict. It ruled that **even if** the company had researched potential accommodations before rejecting Robinson, it failed to conduct the mandatory *individual assessment*. No potential accommodation can be generically implemented or rejected without actually consulting the particular individual and how it fits that person. The company failed to follow the ADA's Direct Threat assessment requirements before making its determination.

Accommodation Must Be "Reasonable," Not Necessarily the One the Employee Prefers. An employee with mobility issues was given both a reserved parking space and a place to store his mobility scooter. The agency then needed to reconfigure the building, which moved the entrance. It then offered the employee a different parking space and area for his scooter. However, the employee rejected this offer, claiming fear that his scooter might be stolen in the new location. He sued under the Rehabilitation Act for failure to accommodate. The court found that the offered accommodation was reasonable. There was no objective evidence of any substantial risk to support the fear of scooter theft. An accommodation can be altered in response to changing circumstances. The alternative offered was sufficient to meet the employee's needs. Providing the specific accommodation the employee requested or preferred was not required. *Bourke v. Collins* (7th Cir. 2025)

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