

## ‘Textual harassment’ on the rise

Text messages can prove to be potent evidence in bias suits.

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It was a classic he-said, she-said story. Two female soccer players at Central Michigan University accused their coach of sexual harassment, alleging that he manipulated them into having secret sexual relationships with him and lied to his players and to school officials to avoid getting caught. The coach, Tony DiTucci, maintained he was innocent, claiming the two students had made suggestive romantic advances toward him, and that he reported it to his supervisors.

Then came the text messages. The students’ attorney, Jennifer Salvatore, had obtained dozens of messages from the coach to the students, including several allegedly sent to one plaintiff when she was still a senior in high school. “He really used text messaging to lay the groundwork for initiating a physical relationship when she got to campus,” said Salvatore. The texts, Salvatore asserts, proved two things: that her clients were telling the truth and that the coach’s conduct was “inappropriate.” In April, she secured a \$450,000 settlement from the university for the women. DiTucci also resigned.

“[The coach’s] words came back to haunt him,” said Salvatore. Text messages, she said, “have really been a gold mine in terms of finding evidence to



Hinshaw & Culbertsons’  
Clint Robison

support and corroborate claims of sexual harassment in the workplace....You look at the texts and you can see who is telling the truth.”

Texting may seem to users as ephemeral — and hard to trace — as a phone conversation. But the messages leave behind an electronic record, and for lawyers, those records are increasingly being used to bolster a variety of claims, particularly in the workplace. For employers, that means a growing source of liability as business-related texting continues to proliferate.

The most prominent cases, thus far, have involved male bosses who have sent scandalous texts to female employees, asking them out on dates or promising promotions in exchange for sexual favors. In litigation, texts have become even more potent than e-mail, employment lawyers say, as texters tend to be more casual with their language. Texts can also serve plaintiffs by helping prove that they have been at a particular place at a particular time.

“Certainly what we’re seeing is just

rather unfathomable....You’d think that people would know that this is something that they shouldn’t do, but they seem to be doing it anyway,” said Danielle Urban, an attorney in the Denver office of Atlanta’s Fisher & Phillips who is currently defending two employers in separate textual harassment lawsuits. They involve lower-level managers allegedly texting photos of their genitalia to female subordinates. “I don’t know what it is about texting,” Urban said. “But it’s really bringing out the worst in people.”

### ‘A WEIRD SITUATION’

In recent months, texts have been key in several cases. In a pending federal sexual harassment suit in Connecticut against World Wrestling Entertainment Inc., a former licensing coordinator says the married, senior director of the company’s consumer products division made sexual advances via late-night texts and phone calls. Four waitresses at Famous Dave’s restaurant in Kanawha County, W. Va., also pointed to text messages in pursuing sexual harassment claims against a supervisor last year, alleging, among other things, that he sent text messages asking for sexual favors.

In January, texts helped two women in Ohio secure a \$495,000 settlement in a sex scandal that led to the resignation of state Attorney General Marc Dann. The women used texts to help show that they were placed in situations that made the AG’s office a hostile work environment. In one case, one of the women produced a

text message that said she was “in a weird situation” and needed a ride home from Dann’s apartment one night.

“Employees are texting like crazy,” said David Barron, a partner in the Houston office of Epstein Becker & Green who is defending an employer in a lawsuit in which a woman alleges her boss sexually harassed her via text messages. Barron said that text message evidence can cut both ways. Employers can use it to argue that sexual banter via text messaging is consensual, he said. That’s what he’s claiming in his case, in which the female employee allegedly sent several texts to her boss.

“These text messages sure look like she was going along and not objecting,” Barron said. “Now the plaintiff’s lawyers might say she was going along because she was afraid she would get fired, but the jury might not believe that.”

David Kerr of the Kerr Law Firm in Mt. Pleasant, Mich., who represented the soccer coach, had a similar strategy in mind. He said he never saw the alleged damaging text messages the students showed the university, but he has seen texts from the students to the coach that suggested the messages were inappropriate. “In Tony’s case, I think there were more text messages from them to him,” Kerr said. “Had the case been tried, I think we would have prodded out those text messages.”

Clint Robison of the Los Angeles office of Chicago’s Hinshaw & Culbertson said texting at work also has a workplace bullying aspect to it. Of the four “textual harassment” lawsuits he’s handling on behalf of employers, one of them involves co-workers creating a hostile work environment by exchanging messages back and forth that another employee found offensive. “Maybe it starts as a little harmless joke, but not everyone has the same sense of humor. Suddenly what was funny to a couple of people is

no longer funny to one person,” Robison said. Before a company knows it, Robison said, a complaint gets filed, then an investigation, and the inevitable lawsuit backed by text messages.

And text messages can be retrieved even after deletion, noted Salvatore, the lawyer in the soccer case, who uses forensic experts to dig texts out of phones when possible. “I’m asking clients who come in who have a sexual harassment claim, ‘Were there text messages sent back and forth? And if so, give me your phone,’ “ Salvatore said.

### BRING IN YOUR TEXTS

Patrick Boyd of New York’s Boyd Law Group said that some clients are bringing him their text messages before he even asks. “Not only am I using [texts] more, but I’m actually finding situations where my clients will forward them on, print them out and bring them into my office with them. Some of them will even bait the harassers beforehand,” said Boyd, who is handling three sexual harassment lawsuits, all of them involving text messages.

Boyd said he believes that text messaging is the “most revealing of the true thoughts — the unrestrained thoughts — of the harasser.... They bang it out real quick, late at night, after a couple glasses of wine. They don’t think twice about it. And they make big mistakes,” Boyd said.

John Camillus of Columbus, Ohio’s Cooper & Elliott, who represented the two women in the Ohio attorney general scandal, said text messages were crucial in proving his case. The two women claimed that sexual harassment was a pervasive problem in a section of the attorney general’s office and that the AG and a top aide subjected them to a hostile work environment. Camillus said that one of the plaintiffs used a batch of text messages showing that she was at a party at the AG’s apartment, that

she had been drinking, and that she felt uncomfortable and wanted to leave. He said the texts helped show that the women were harassed and mistreated. “These sorts of cases tend to be he-said, she-said. This helped corroborate the she-said portion of it.”

David Walton, a management-side attorney at Cozen O’Connor, concedes that there’s an incidence of sexual harassment via text messages. He stressed, however, that employers don’t review text messages very often because of the time-intensive effort that is required. He said most reviews are done after an employee complains or as part of some related internal investigation. Walton, who is vice chairman of his firm’s e-discovery task force, said there are privacy issues that employers need to consider before reviewing text messages. For example, if the employer owns the device, it has the right to review it. But if the employee owns the device and is reimbursed for the service, “the employer doesn’t have an unfettered right to review,” he said.

“For employers, this stuff is an absolute nightmare,” said management-side attorney Steve Palazzolo of Grand Rapids, Mich.’s Warner Norcross & Judd, who has developed many policies for employers that address harassment on company time and with company equipment. “But we’ll get through this,” he said. “Everybody flipped about e-mail. Everybody flipped about the Internet. Text messaging — we’ll deal with it.”