

Wisconsin Employee May Prosecute WFEA Claims Against Employer Despite Valid Waiver and Release of Claims

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The Wisconsin Labor and Industry Review Commission recently issued a highly controversial decision, *Xu v. Epic Systems, Inc.*, holding that (1) an employee cannot waive the right to file a discrimination complaint against her or his employer under the Wisconsin Fair Employment Act (WFEA), and (2) an employee may prosecute WFEA claims on the merits against her or his former employer—and potentially receive a judgment against the former employer before the Wisconsin Equal Rights Division (ERD)—even if he or she waived and released any and all such claims against his or her employer in a valid severance agreement.

This decision stresses the importance of carefully drafting severance agreements to exclude potential complaints by former employees under the WFEA.

The employee in *Xu v. Epic Systems, Inc.* entered into a severance agreement with his former employer with no pending claims at the time of discharge. In exchange for thousands of dollars, he “promise[d] not to sue” and waived and released all potential claims against his former employer for alleged discrimination of any type, as well as all claims arising under “any federal, state or local law, regulation, ordinance or order concerning the employment relationship . . . or the termination of employment.” However, his severance agreement also stated the following:

Nothing in this release is a waiver of a right to file a charge or complaint with administrative agencies such as the federal EEOC that I cannot be prohibited from or punished for filing as a matter of law, but I waive any right to recover damages or obtain individual relief that might otherwise result from the filing of such charge with regard to any released claim.

That language is a typical reservation of rights clause often included in severance agreements to comply with several federal laws that have been interpreted to prohibit the waiver of the right to file a charge or complaint with certain federal agencies (e.g., the U.S. Equal Employment Opportunity Commission (EEOC), the Securities and Exchange Commission, the Occupational Safety and Health Administration, the National Labor Relations Board) in such agreements.

Nearly one year after entering into the severance agreement, Xu filed a complaint with the federal EEOC alleging race discrimination and retaliation by his former employer. The EEOC closed the case soon thereafter, and Xu’s federal law claims were dismissed. However, due to the workshare

agreement between the Wisconsin ERD and the EEOC, Xu's discrimination and retaliation claims were also cross-filed with the ERD under the WFEA.

Throughout the ERD case, the employer argued that Xu had signed a severance agreement containing a valid waiver and release of all claims arising out of his employment and, therefore, had waived his right to file a complaint with the ERD. Xu argued that he had not waived his right to file a complaint and that the only thing he had waived was his right to seek damages or individual relief that might result from filing a complaint with the ERD. His stated objective in pursuing the complaint under the WFEA was to prevent further similar conduct by his former employer. The ERD dismissed the complaint.

Xu appealed the ERD case and, on review, the Wisconsin Labor and Industry Review Commission held that even though Xu had waived any right to damages or other types of individualized relief (e.g., back pay or reinstatement) under the WFEA in his severance agreement, he had not waived his right to file a complaint with the ERD. The commission's decision was based primarily on the aforementioned language in the reservation of rights clause in the severance agreement stating that "nothing in this release is a waiver of a right to file a charge or complaint with administrative agencies such as the federal EEOC." The commission concluded that the ERD is a state agency comparable to the EEOC and that the "language used in the severance agreement—which was drafted by the respondent with no input from the complainant—was intended to preserve the complainant's right to file a complaint with the ERD." Also, the commission concluded that, just as with certain federal agencies (for example the EEOC), "the complainant cannot be prohibited from or punished for filing a complaint with the ERD."

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