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CHEROKEE COUNCIL HOUSE
CHEROKEE, NORTH CAROLINA

DATE

ORDINANCE NO. _____ (2016)

WHEREAS, the Charter and Governing Document authorizes and empowers the Eastern Band of Cherokee Indians (EBCI) Tribal Council to adopt laws and regulations for the general government of the Tribe. Charter and Governing Document, sect. 23 (Sept. 5, 1995) *see also* C.C. §117-10.

WHEREAS, the EBCI Tribal Council constitutes the Eastern Band of Cherokee Indian's Legislative Branch of government. C.C. §117-10.

WHEREAS, there is a need to statutorily protect all Tribal and Tribal Entity employees who make disclosures evidencing illegal or improper government activities, and;

WHEREAS, the intent of this ordinance is to strengthen and improve protection for the rights of Tribal and Tribal Entity employees, to prevent reprisals, and to help eliminate wrongdoing with the Tribal Government.

NOW THEREFORE BE IT ORDAINED by the Eastern Band of Cherokee Indians Tribal Council in Council assembled, at which a quorum is present, the Cherokee Code shall add Article 17.-Retaliatory Employment Discrimination and amend Cherokee Code §114-1 as follows:

Cherokee Code

Chapter 95 – WAGES/EMPLOYMENT RIGHTS

ARTICLE 8.-RETALIATORY EMPLOYMENT DISCRIMINATION

1 **Sec. 95-200.-Definitions**

2 The following definitions shall apply to this Article:

3 A. “Adverse employment action” shall mean showing a retaliatory action has a
4 detrimental and substantial effect on the terms, conditions, or privileges of a
5 covered employee’s employment or required the covered employee to work in a
6 discriminatorily hostile or abusive work environment. A change that is merely
7 contrary to a covered employee’s interest or liking is insufficient.

8 B. “Covered employees” shall mean, with respect to any personnel action, any
9 Tribal and Tribal Entity employees as defined in the Personnel Policies and
10 Procedures for the Eastern Band of Cherokee Indians, sec. 5.03, but does not
11 include Political Appointments as defined in sec. 5.03(D).

12 C. “Disclosure” shall mean a formal or informal communication or transmission,
13 but does not include a communication concerning policy decisions that lawfully
14 exercises discretionary authority unless the employee or applicant providing the
15 disclosure reasonably believes that the disclosure evidences

16 1. any violation of any law, rule, or regulation; or

17 2. gross mismanagement, a gross waste of funds, an abuse of authority, or a
18 substantial and specific danger to public health or safety.

19 D. “Retaliatory action” shall mean any adverse employment action including but not
20 limited to: discharge, suspension, demotion, retaliatory relocation (transfer)
21

22 **Sec. 95-201.-Discrimination prohibited**

23 A. No person shall take, or threaten to take or fail to take, a personnel action with
24 respect to any covered employee or applicant for employment because of-

25 1. any disclosure of information by an employee or applicant with the
26 employee or applicant reasonably evidences-

27 a. any violation of any law, rule, or regulation, or

28 b. gross mismanagement, a gross waste of funds an abuse of
29 authority, or a substantial and specific danger to public health or
30 safety.

1 2. any disclosure to the Office of Internal Audit, Cherokee Code §117-100
2 through 112, of which the employee or applicant reasonably believes
3 evidences –

4 a. any violation (other than a violation of this section) of any law,
5 rule, or regulation, or

6 b. gross mismanagement, a gross waste of funds, an abuse of
7 authority, or a substantial and specific danger to public health or
8 safety;

9 3. complies with a properly issued and served subpoena issued by the Tribal
10 Council in accordance with Cherokee Code §117-17.

11 B. This section shall not be construed to authorize the withholding of information
12 from the Tribal Council or the taking of any personnel action against an
13 employee who discloses information to Tribal Council.

14
15 **Sec. 95-202.-Complaint; investigation; conciliation**

16 A. Any covered employee who believes that he or she has been subject to prohibited
17 discrimination found in Cherokee Code §95-201 may file a written complaint
18 with the Office of Internal Audit within one hundred and eighty (180) calendar
19 days of the alleged discrimination. The Office of Internal Audit shall investigate
20 the complaint in accordance with Cherokee Code §117-103 and their adopted
21 policies and procedures according to Cherokee Code §117-110.

22 B. If the Office of Internal Audit is named in the complaint, then the Department of
23 Justice shall investigate.

24 C. Any reports regarding discrimination are confidential and not subject to
25 disclosure under the Public Records Act of 2006, Cherokee Code, Ch. 132.

26 D. To establish discrimination, a covered employee must demonstrate by a
27 preponderance of the evidence that the covered employee's engagement in
28 protected activity is substantial motivating factor for the adverse employment
29 action. The supervisor or manager may rebut this claim if he or she demonstrates
30 by a preponderance of the evidence that he or she would have taken the same

1 employment action regardless of the covered employee's participation in
2 protected activity. If the Office of Internal Affairs determines after investigation
3 that there is reasonable cause to believe that the allegation is true, the Office of
4 Internal Audit shall attempt to eliminate the alleged violation by informal
5 methods which may consist of conference, conciliation, or mediation. The Office
6 of Internal Affairs shall make a determination as soon as possible and, in any
7 event, not later than ninety (90) calendar days after the filing of the complaint.

8 E. If the Office of Internal Audit is unable to resolve the alleged violation through
9 the informal methods, the Office of Internal Audit shall notify the parties in
10 writing that conciliation efforts failed. The Office of Internal Audit shall issue a
11 right-to-sue letter to the employee enabling the employee to bring a civil action
12 pursuant to C. C. §95-204.

13 F. An employee may make a written request to the Office of Internal Audit for a
14 right-to-sue letter after ninety (90) days following the filing of a written
15 complaint if the Office of Internal Audit has not issued a notice of conciliation
16 failure and has not commenced an action pursuant to C. C. §95-202.

17 G. Nothing said or done during the use of the informal methods described in C. C.
18 §95-202(D) shall be considered public record under the Public Records Act of
19 2006, C. C. ch. 132, or used as evidence in a subsequent proceeding under C. C.
20 §95-204 without the written consent of the persons concerned.

21
22 **Sec. 95-203.-Discipline**

23 Any manager, supervisor, or employee of the Tribe or Tribal Entity who knowingly
24 engages in conduct prohibited by this Article shall be disciplined up to and including
25 discharge.

26
27 **Sec. 95-204.-Civil Penalties**

28 A. Any covered employee who has been issued a right-to-sue letter may bring a
29 civil action against the Tribe or the Tribal Entity's officer or employee who
30 committed the violation.

1 B. A civil action under C. C. §95-204 shall be commenced by an employee within
2 ninety (90) calendar days of the date upon which the Office of Internal Audit
3 issued the right-to-sue letter.

4 C. The Eastern Band of Cherokee Indians is a sovereign nation, immune from suit
5 but limitedly waives sovereign immunity for Cherokee Code §95-204 when the
6 suit is brought in the Cherokee Court and only for relief sought in C. C. §95-
7 204(D).

8 D. The employee may seek and the court may award any or all of the following
9 types of relief:

10 1. An injunction to enjoin continued violation of this Article.

11 2. Reinstatement of the employee to the same position held before the
12 retaliatory action or discrimination or to an equivalent position.

13 3. Reinstatement of full fringe benefits and seniority rights.

14 4. Compensation for lost wages, lost benefits, and other economic losses
15 that were proximately caused by the retaliatory action or discrimination,
16 or a civil penalty for such violation that shall not exceed five thousand
17 dollars (\$5,000), whichever is higher.

18 5. The court may award to the plaintiff and assess against the defendant the
19 reasonable costs and expenses, including attorney's fees, of the plaintiff
20 in bringing the action pursuant to C. C. §95-204. If the court determines
21 that the plaintiff's action is frivolous, it may award to the defendant and
22 assess against the plaintiff reasonable costs and expenses, including
23 attorney's fees, of the defendant in defending the action brought pursuant
24 to C. C. §95-204.

25 E. Parties to a civil action brought pursuant to C. C. §95-204 shall have the right to
26 a jury trial as provided in the North Carolina Rules of Civil Procedure and
27 adopted by the Eastern Band of Cherokee Indians in C.C. §7-14(a).

28 F. An employee shall only bring an action under this Article when he or she has
29 been issued a right-to-sue letter by the Office of Internal Audit.

30

1 **Sec. 95-205.-Rules**

2 The Office of Internal Audit may adopt rules needed to implement this Article pursuant
3 to the provisions in Cherokee Code §117-10.

4
5 **Sec. 95-206.-Severability**

6 The provisions of this Article are declared to be severable and if any clause, sentence, word,
7 section or provision is hereafter declared void or unenforceable for any reason by the Cherokee
8 Court, it shall not affect the remainder of the Article which shall continue in full force and effect.

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11
12 **Cherokee Code**
13 **Chapter 114 – DEPARTMENT OF JUSTICE**

14 ***

15 Sec. 114-2.-Duties.

16 Is shall be the duty of the Attorney General:

17 ***

18 f. To investigate a discrimination complaint filed by a covered employee against
19 the Office of Internal Audit in accordance with Cherokee Code §96-6(B).

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21 BE IT FURTHER ORDAINED the intent of this ordinance shall be carried out by the Principal
22 Chief.

23 BE IT FINALLY ORDAINED any prior ordinance that may be in conflict or contrary to the
24 intent of this ordinance is hereby rescinded.

25
26 Submitted by: Travis K. Smith, Birdtown Representative
27 Eastern Band of Cherokee Indians Tribal Council