

CHEROKEE COUNCIL HOUSE
CHEROKEE, NORTH CAROLINA

SEP 08 2016

DATE

ORDINANCE NO. 362 (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 96 – TRIBAL EMPLOYEES
ARTICLE 17.-RETALIATORY EMPLOYMENT DISCRIMINATION

Sec. 96-4.-Definitions.

The following definitions shall apply to this Article:

- A. "Adverse employment action" shall mean showing a retaliatory action has a detrimental and substantial effect on the terms, conditions, or privileges of a covered employee's employment or required the covered employee to work in a discriminatorily hostile or abusive work environment. A change that is merely contrary to a covered employee's interest or liking is insufficient.
- B. "Covered employees" shall mean, with respect to any personnel action, any Tribal and Tribal Entity employees as defined in the Personnel Policies and Procedures for the Eastern Band of Cherokee Indians, sec. 5.03, but does not include Political Appointments as defined in sec. 5.03(D).

- C. "Disclosure" shall mean a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences
1. any violation of any law, rule, or regulation; or
 2. gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.
- D. "Retaliatory action" shall mean any adverse employment action including but not limited to: discharge, suspension, demotion, retaliatory relocation (transfer)

Sec. 96-5.-Discrimination prohibited.

- A. No person shall take or fail to take, or threaten to take or fail to take, a personnel action with respect to any covered employee or applicant for employment because of-
1. any disclosure of information by an employee or applicant with the employee or applicant reasonably evidences-
 - a. any violation of any law, rule, or regulation, or
 - b. gross mismanagement, a gross waste of funds an abuse of authority, or a substantial and specific danger to public health or safety.
 2. any disclosure to the Office of Internal Audit, Cherokee Code §117-100 through 112, of which the employee or applicant reasonably believes evidences –
 - a. any violation (other than a violation of this section) of any law, rule, or regulation, or
 - b. gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;
 3. complies with a properly issued and served subpoena issued by the Tribal Council in accordance with Cherokee Code §117-17.
- B. This section shall not be construed to authorize the withholding of information from the Tribal Council or the taking of any personnel action against an employee who discloses information to Tribal Council.

Sec. 96-6.-Complaint; investigation; conciliation.

- A. Any covered employee who believes that he or she has been subject to prohibited discrimination found in Cherokee Code §96-5 may file a complaint with the Office of Internal Audit within one hundred and eighty (180) calendar days of the alleged discrimination. The Office of Internal Audit shall investigate the complaint in accordance with Cherokee Code §117-103 and their adopted policies and procedures according to Cherokee Code §117-110.
- B. If the Office of Internal Audit is named in the complaint, then the Department of Justice shall investigate.
- C. Any reports regarding discrimination are confidential and not subject to disclosure.

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

Sec. 96-7.-Discipline.

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

Sec. 96-8.-Civil Penalties.

- A. Any covered employee who reasonably believes that he or she has been the subject of discrimination in violation of this Article may bring a civil action against the Tribe or the Tribal Entity's officer or employee who committed the violation.
- B. The Eastern Band of Cherokee Indians is a sovereign nation, immune from suit but limitedly waives sovereign immunity for Cherokee Code § 96-8(1) when the suit is brought in the Cherokee Court.
- C. The civil penalty for such violation shall not exceed five thousand dollars (\$5,000).
- D. Such action must be filed no later than one year after the date the covered employee files a complaint with the Office of Internal Audit.

Sec. 96-9.-Rules

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

**Cherokee Code
Chapter 114 – DEPARTMENT OF JUSTICE**

Sec. 114-2.-Duties.

Is shall be the duty of the Attorney General:

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

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

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

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