

TABLED

CHEROKEE COUNCIL HOUSE  
CHEROKEE, NORTH CAROLINA

MAR 14 2019

DATE

ORDINANCE NO. 523 (2019)

- WHEREAS, the Eastern Band of Cherokee Indians established the Tribal Employment Rights Office (hereinafter TERO) under Cherokee Code Section 95-11 to increase employment of Native Americans and to eradicate discrimination against Native Americans; and
- WHEREAS, it has been determined by the Tribal Employment Rights Committee (hereinafter TERC) that amendments must be made to Cherokee Code Chapter 95, Article II, *Employment Preference Law*, to effectively protect the rights and dignity of all persons employed within the territory of the Eastern Band; and
- WHEREAS, current Cherokee Code Section 95-13(c) lacks the necessary detail and definitions to effectively protect employees from the many types of discrimination that could arise in the workplace; and
- WHEREAS, there is a need to amend Cherokee Code Ch. 95, Art. II, to include four new sections 95-13(A), Sec. 95-13(B), Sec. 95-13(C), and Sec. 95-13(D), which are more comprehensive and detailed than the current section; and
- WHEREAS, there is a need to amend Cherokee Code Section 95-12 to include new definitions concerning the proposed amendments and to reorganize the definitions into alphabetical order.
- THEREFORE, BE IT ORDAINED, by the Eastern Band of Cherokee Indians, in Tribal Council assembled, at which a quorum is present, that Cherokee Code Chapter 95 shall be amended to read as follows.
- BE IT FURTHER ORDAINED that all ordinances or resolutions that are inconsistent with this ordinance are hereby rescinded.
- BE IT FINALLY ORDAINED that this ordinance shall become effective upon ratification by the Principal Chief.

*Submitted by the Tribal Employment Rights Commission (TERC).*

## ARTICLE II. - EMPLOYMENT PREFERENCE LAW

### Sec. 95-12. - Definitions.

- (a) "Because of sex or on the basis of sex" shall include, but are not limited to, because of or on the basis of pregnancy, childbirth, gender expression, gender identity, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.
- (b) "Cherokee Court or Court" shall mean the Court of Indian Offenses for the Eastern Band of Cherokee Indians, or any successor tribal court established by the Tribe.
- (c) "Cherokee Indian Reservation or Reservation" shall mean the Qualla Boundary and all other lands held in trust for or owned by the Eastern Band of the Cherokee Indians.
- (d) "Commercial enterprise" shall mean any activity by the Tribe or the federal or state governments other than a traditional government function as defined by the Internal Revenue Service.
- (e) "Commission or TERC" shall mean the Tribal Employment Rights Commission established by this law.
- (f) "Covered employer" shall mean the Tribe, all Tribal programs and entities, and all other employers who receive grant or contract funding from the Tribe, or who lease a parcel of tribally owned land that is not assigned as a possessory interest to an individual Tribal member. All other employers are encouraged to use the TERO skills bank. Pursuant to Resolution 150 (1994), all employers holding a Trader's License and conducting business on Cherokee trust lands who desire to advertise for employment opportunities with newspapers and the media outside of Cherokee, shall also advertise such employment opportunities in the Cherokee One Feather, and such advertising shall be deemed a condition of conducting business on Cherokee trust lands.
- (g) "Disability" shall mean, with respect to an individual-
  - (1) a physical or mental impairment that substantially limits one or more major life activities of such individual;
    - (A) "Major life activities" include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working; and
    - (B) "Major life activities" also include the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
  - (2) a record of such an impairment; or
  - (3) being "regarded as" having such an impairment;
    - (A) an individual meets the requirement of being "regarded as" having such an impairment if the individual establishes that he or she has been subjected to an action prohibited under this Chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) an individual shall not be "regarded as" having such an impairment if the impairments are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

~~(a)(h)~~ "Employee" shall means any person employed for remuneration.

~~(b)(i)~~ "Employer" shall means any person, partnership, corporation or other entity that employs individuals for wages.

~~(c)~~ Covered employer means the Tribe, all Tribal programs and entities, and all other employers who receive grant or contract funding from the Tribe, or who lease a parcel of tribally owned land that is not assigned as a possessory interest to an individual Tribal member. All other employers are encouraged to use the TERO skills bank. Pursuant to Resolution 150 (1994), all employers holding a Trader's License and conducting business on Cherokee trust lands who desire to advertise for employment opportunities with newspapers and the media outside of Cherokee, shall also advertise such employment opportunities in the Cherokee One Feather, and such advertising shall be deemed a condition of conducting business on Cherokee trust lands.

~~(d)(j)~~ "Entity" shall means any person, partnership, corporation, joint venture, government, governmental enterprise, or any other natural or artificial person or organization. The term "entity" is intended to be as broad as possible to ensure this law's coverage over all employment activities within the Tribe's jurisdiction, and the term shall be so interpreted by the Commission and the Court.

~~(k)~~ "Gender expression" shall mean the external appearance of one's gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.

~~(l)~~ "Gender identity" shall mean an individual's innermost concept of one's self as male, female, a blend of both, or neither. Moreover, it is how individuals perceive themselves and what they call themselves. A person's gender identity can be the same or different from their sex assigned at birth.

~~(e)~~ Commission or TERC means the Tribal Employment Rights Commission established by this law.

~~(f)~~ Commercial enterprise means any activity by the Tribe or the federal or state governments other than a traditional government function as defined by the Internal Revenue Service.

~~(g)(m)~~ "Indian" shall means any member of a federally-recognized Indian Tribe.

~~(h)(n)~~ "Local Indian" shall means any member of the Eastern Band of Cherokee Indians, or any member of another federally-recognized tribe who resides within the exterior boundaries of the Reservation.

~~(i)~~ Cherokee Indian Reservation or Reservation means the Qualla Boundary and all other lands held in trust for or owned by the Eastern Band of the Cherokee Indians.

~~(o)~~ "Protected activity" shall mean participating in any manner in the administrative claim process of TERO, EEOC, or any covered employer or economic entity. Additionally, protected activity shall also mean opposition to any practice or act made unlawful under the employment discrimination statutes of the Tribe and federal government.

~~(p)~~ "Qualified individual" shall mean an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. Consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(g) "Reasonable accommodation" may include, but is not limited to, the following:

(1) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(2) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(r) "Sexual orientation" shall mean a person's sexual identity in relation to the gender to which they are attracted; the fact of being heterosexual, homosexual, or bisexual.

(j)(s) "Tribe" shall mean the Eastern Band of Cherokee Indians.

(k) Cherokee Court or Court means the Court of Indian Offenses for the Eastern Band of Cherokee Indians, or any successor tribal court established by the Tribe.

(t) "Undue hardship" shall mean an action requiring significant difficulty or expense, when considered in light of the following factors:

(1) the nature and cost of the accommodation needed under this Chapter;

(2) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(3) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(4) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

(Ord. No. 593, 7-1-1999; Ord. No. 667, 9-7-1999)

**Sec. 95-13. - Indian preference in employment.**

- (a) All covered employers for all employment occurring within the Reservation shall give preference to qualified Indians with the first preference to local Indians in all initial hiring, training, and other aspects of employment. Local Indians shall also receive preferential protection from layoffs.
- (b) Preference shall be given to local Indians who meet the minimum qualifications for a particular job, regardless of any higher qualifications that non-Indians may have. Spouses of local Indians who meet the minimum qualifications for a particular job shall be entitled to a second preference. (Covered employers may adopt promotion policies which reward employees who perform at higher levels of performance and such employers will not be bound to promote qualified Indians who meet only the minimum requirements of the job if these employees do not also meet the higher

performance requirements set out in the promotion criteria of the covered employers' personnel policy. However, once the higher promotion criteria is met, preference will be given to the Indian meeting that promotion criteria.) This chapter shall not be construed to prevent a covered employer from selecting the most qualified Indian applicant, or from selecting a non-Indian if no qualified Indian applies for the job.

~~(c) No covered employer shall discriminate against any employee on the basis of gender, age, disability, or religion.~~

~~(d)~~(c) For purposes of hiring, a covered employer who:

- (1) Utilizes the hiring hall or skills bank established by the Commission,
- (2) Notifies at least three Indians of the opportunity to apply for the job (unless fewer are listed for the available job), and
- (3) Complies with ~~subsections (b) and (c) of this section,~~ Sec. 95-13(b), Sec. 95-13(A), Sec. 95-13(B), Sec. 95-13(C), and Sec. 95-13(D) of this Article,

shall be considered in compliance with this preference law.

~~(e)~~(d) All covered employers shall comply with the rules, regulations, guidelines, and orders of the Tribal Employment Rights Commission which set forth the specific obligations of employers in regard to Indian preference.

~~(f)~~(e) The requirements of this law shall not apply to any direct employment by the federal, state or other governments or their subdivisions. It shall apply to all contractors or grantees of such governments and to all commercial enterprises operated by such governments.

~~(g)~~(f) This law shall apply to the Tribe, except that section 95-23, 95-24, and 95-25 shall not. Any complaint against the Tribe for violation of this law shall be filed with the Director prior to a hearing and appeal under any applicable personnel policies and procedures of the Tribe and shall not be heard by the Commission. Nothing in this law shall be construed as a waiver of the Tribe's sovereign immunity.

~~(h)~~(g) For purposes of initial hiring by the Tribe or a program funded by the Tribe, if a local Indian meeting the minimum qualifications applies for a job, no other person shall be hired without a prior resolution approved by the Tribal Council.

(Ord. No. 593, 7-1-1999; Ord. No. 674, 4-6-2001)

#### **Sec. 95-13(A) - Discrimination based on age is prohibited**

(a) It shall be unlawful for an employer-

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Chapter.

(b) A person must be at least 40 years old to bring a claim of age discrimination under this section.

(c) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(d) It shall be lawful for an employer, employment agency, or labor organization-

(1) to take any action otherwise prohibited under this Article where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

(2) to take any action otherwise prohibited under this Article—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan-

(i) there, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this Chapter.

Regardless of clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by sec. 95-13(A)(b) of this Article, because of the age of such individual. A covered employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any hearing brought under this Section; or

(3) to discharge or otherwise discipline an individual for good cause.

**Sec. 95-13(B).** – Discrimination based on disability is prohibited

(a) No covered entity or economic entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes-

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered employer's qualified applicant or employee with a disability to the discrimination prohibited by this section;

(3) utilizing standards, criteria, or methods of administration-

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered employer or economic entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered employer or economic entity; or

(6) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(7) using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test, or other selection criteria, as used by the covered employer or economic entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(8) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability

that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Medical examinations and inquiries. - The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(1) Pre-employment.

(A) Prohibited examination or inquiry. - Except as provided in paragraph (2), a covered employer or economic entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry. - A covered employer or economic entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions.

(2) Employment entrance examination. - A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if-

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that-

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) TERO officials investigating compliance with this Chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this section.

(3) Examination and inquiry. -

(A) A covered employer or economic entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual



with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) A covered employer or economic entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (2).

**Sec. 95-13(C).** – Discrimination based on race, color, religion, sex, sexual orientation, gender identity, gender expression, or national origin is prohibited

(a) It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, sexual orientation, gender identity, gender expression, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, sexual orientation, gender identity, gender expression, or national origin.

(b) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, sexual orientation, gender identity, gender expression, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(c) Except as otherwise provided in this section, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, sexual orientation, gender identity, gender expression, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(d) It shall be a lawful employment practice, for a school or other educational institution, to hire and employ employees of a particular religion if such school or other educational institution are, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular

religious corporation, association, or society, or if the curriculum of such school or other educational institution is directed toward the propagation of a particular religion.

(e) It shall be a lawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, sexual orientation, gender identity, gender expression, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, sexual orientation, gender identity, gender expression, or national origin.

**Sec. 95-13(D). – Retaliation is prohibited.**

(a) It shall be unlawful for an employer to retaliate against any of his employees or applicants for employment because that individual has opposed any practice or act made unlawful by this Chapter, or because that individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Chapter.

(b) Retaliation occurs when a covered employer or economic entity takes a materially adverse action because an individual engaged in protected activity.