UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

September 25, 2008

QAIS IBRAHIM ALHAMEED, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 08B00030
GRAND TRAVERSE RESORT & CASINO, Respondent.	)	

ORDER OF INQUIRY

I. INTRODUCTION AND PROCEDURAL HISTORY

Qais I. Alhameed, a citizen of the Hashemite Kingdom of Jordan and a United States permanent resident since June 28, 2007, filed a charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) on December 28, 2007, alleging that the Grand Traverse Resort & Casinos had engaged in unfair immigration-related employment practices on or about October 8, 2007 in violation of the Immigration and Nationality Act, 8 U.S.C. § 1324b (2006) (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA). He alleged that the Casino discriminated against him when they fired and/or refused to hire him based on his citizenship status and national origin and required him to provide unnecessary documentation, in addition to that which he already provided, to prove his work eligibility. The complaint described several interactions with multiple employees during the application and background check process, all of whom he alleges participated in the discrimination and document abuse.

On April 25, 2008, OSC sent Mr. Alhameed a letter informing him that it had not yet decided whether there was reasonable cause to believe that a violation of § 1324b had occurred, or whether to file a complaint before an administrative law judge. The letter notified him that he had 90 days from its receipt to file his own complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). On June 25, 2008, Mr. Alhameed filed a complaint with OCAHO, containing the same material allegations as his original OSC complaint. On June 30, 2008, the

case was assigned to this office, and a copy of the complaint was sent to the Respondent - at that time, Grand Traverse Resort & Casinos – with a notice that any answer must be filed within thirty (30) days of its receipt.

On August 5, 2008, the Grand Traverse Band of Ottawa and Chippewa Indians (GTB) timely filed an answer denying the material allegations of the complaint. The answer also disputed the identity of the Respondent, asserting that the "Grand Traverse Resort & Casinos" did not exist as a legal entity, and that the real party in interest was GTB itself. It also contended that GTB enjoyed sovereign immunity from lawsuits by private individuals, and that therefore the case should be dismissed.[1]

On August 15, 2008, Mr. Alhameed filed "Complainants [sic] Comments on the Response Document Received and Motions to Continue Case Reguarding [sic] Unfair Immigration-Related Employment Practices." The comments restated Mr. Alhameed's original allegations in greater detail, clarifying some of the factual circumstances surrounding the incidents at issue, and asserted, *inter alia*, that several entities other than the Grand Traverse Resort & Casinos are the appropriate Respondents (as discussed further in Section II(B), *infra*). The comments also stated that the "business discrepancies" causing him to name the Casino should "not be held against him," and that GTB, "although being a Sovereign Nation," should nonetheless be held liable for the alleged violations. Thus, he requested that the case not be dismissed.

II. DISCUSSION

A. Respondent's Sovereign Immunity

The question of whether or not the Respondent possesses sovereign immunity from suit is a threshold matter which must be resolved before reaching the merits of the case. 5B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE, § 1350 (explaining that sovereign immunity is generally considered a question of subject matter jurisdiction); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 508-509 (1991) (finding Indian tribal sovereign immunity); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998); *Keweenaw Bay Indian Cmty. v. Michigan*, 11 F.3d 1341, 1347 (6th Cir. 1993). If the Respondent enjoys sovereign immunity, OCAHO lacks subject matter jurisdiction over at least the retroactive monetary claims at issue,[2] and those claims will be dismissed.

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[1] GTB also asserted substantive defenses, including compliance with the law in good faith. These defenses are not addressed here because I do not yet reach the merits of the underlying claim.

[2] Although Indian tribes possess broad immunity from suit for retroactive monetary (continued...)

When evaluating a claim of Indian tribal sovereign immunity, courts first assess whether or not the statute at issue applies to Indian tribes. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115-16 (9th Cir. 1985). As a rule, in the absence of contrary Congressional intent, a statute of "general applicability" presumptively applies to Indian tribes. *See Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 117 (1960). Courts have recognized three exceptions to this rule, following *Coeur d'Alene Tribal Farm*: (1) where the law regards "exclusive rights of self-governance in purely intramural matters" such as inheritance law and tribal membership rules, (2) where applying the law would abrogate rights under a treaty, or (3) where there are "other indications," such as clear legislative history, that Congress intended to exclude Indian tribes from the reach of the statute. 751 F.2d at 1116.

As was observed in *In Re Investigation of: Miccosukee Resort and Convention Center*, 9 OCAHO 1114, 2004 WL 3312070, at * 4 (Dec. 10, 2004), § 1324b is a statute of general applicability. Furthermore, § 1324b does not fall under any of the three *Coeur d'Alene* exceptions that might render it inapplicable to Indian tribes. As the statute does not abrogate any treaties with the Indian tribes, and no "other" factors indicate Congressional intent to except them from this law, *see id.*, the remaining question is whether or not the law interferes with "exclusive rights of self-governance in purely intramural matters." *Coeur d'Alene Tribal Farm*, 751 F.2d at 1116. Both this forum and several circuit courts have found that commercial enterprises, such as casinos, farms, and other for-profit entities not associated with governmental functions are not instruments of self-governance that can avoid the reach of general federal statutes. *Miccosukee Resort*, 9 OCAHO 1114 at 6; *see also Coeur d'Alene Tribal Farm*, 751 F.2d at 1116-17; *Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1129 (11th Cir. 1999) (hereinafter *FPA*); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 179-80 (2d Cir. 1996).

Thus, whether the proper Respondent is GTB itself or one of its subsidiary enterprises, § 1324b applies to it. In addition, GTB appears to agree that § 1324b applies to it, contending only that a private individual, such as Mr. Alhameed, may not bring suit against it. As such, it is undisputed

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[2](...continued)
damages, the courts do not appear to have decided conclusively whether an individual may seek prospective injunctive relief against a tribe. The Court has never spoken on the issue of whether an individual may sue an Indian tribe for equitable relief, but the possibility appears to remain open. *Potawatomi*, 498 U.S. at 515-16 (Stevens. J., concurring). In *Potawatomi*, Justice Stevens points out in concurrence that the Court "rejects the argument that . . . the Tribe . . . is completely immune from legal process" and "recognizes that a tribe's sovereign immunity from actions seeking money damages does not necessarily extend to actions seeking equitable relief." *Id.* No authority appears to address this issue directly, so the question is still an open one. Thus, even if Mr. Alhameed's claim for back pay cannot be adjudicated due to the Grand Traverse Band's sovereign immunity, he may still be able to continue his claim for equitable relief. This is a question to be addressed at a later stage of the case.

that § 1324b applies to the Respondent.

Even where a statute applies to an Indian tribe, it is still necessary to determine whether or not the tribe is amenable to private suit for violation of that statute. In other words, "whether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions." *FPA*, 166 F.3d at 1130 (citing Kiowa Tribe, 523 U.S. at 754-55) (emphasis original). Indian tribes are immune from private lawsuits "absent a clear waiver by the tribe or congressional abrogation." Potawatomi, 498 U.S. at 509 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). Tribal immunity from private suit covers a broad scope of entities, including not only tribes themselves, but also "tribal business ventures" such as tribe-run convenience stores and casinos. *Potawatomi*, 498 U.S. at 511-12 (convenience store); *FPA*, 166 F.3d at 1130 (casino). Accordingly, here, if the true Respondent is GTB or one of its business entities, it is immune from private suit unless Congress has abrogated its immunity under § 1324(b).

To abrogate immunity, Congress must "make its intention unmistakably clear in the language of the statute," rather than relying on "inferences from general statutory language." *FPA*, 166 F.3d at 1131 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242)(1985)). The language must be particularly plain, given that "where Indian rights are at issue, ambiguities in federal laws must be resolved to the Indians' advantage." *FPA*, 166 F.3d at 1131 (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). For instance, in *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians*, the Sixth Circuit found that Title III of the Americans with Disabilities Act did not allow private suit against a tribal casino because the statute did not specifically mention Indian tribes. 166 F.3d at 1131-32. Stressing "respect for the inherent autonomy Indian tribes enjoy," the court noted the "complete absence in the ADA of any reference to the amenity of Indian tribes to suit" and explicitly refused to take any meaning from the exemption of Indian tribes in the legislative history of Title VII of the Civil Rights Act and even Title I of the ADA. *Id.* at 1130, 1133. The Second Circuit came to a similar conclusion in *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2nd Cir. 2000), finding that the Copyright Act did not apply to Indian tribes because it did not facially mention the tribes, and "a congressional abrogation of tribal immunity cannot be implied."

However, court determinations that a statute abrogates Indian tribal sovereign immunity are not unprecedented, even where the statutes at issue either did not mention Indian tribes specifically, or did not do so in the specific provision abrogating sovereign immunity. For example, in *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1058, 59 (9th Cir. 2004), the Ninth Circuit found that the Bankruptcy Act abrogated the Navajo Nation's sovereign immunity because it expressly abrogated the immunity of "any foreign or domestic government." The Bankruptcy Act does not specifically mention Indian tribes, but because previous case law has found that the tribes are "domestic dependent nations," *Potawatomi*, 498 U.S. at 509, the tribes are clearly and unequivocally included in the statute's abrogation. *Krystal Energy Co.*, 357 F.3d at 1058.

The Second Circuit used a similar piecemeal method of finding congressional abrogation in *Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174, 1181-82 (10th Cir. 1999). There, the court concluded that the Safe Drinking Water Act "contain[ed] a clear and explicit waiver of sovereign immunity" because its whistleblower provision allows private suit against any person who takes discriminatory action, where another provision defines "person" as including a "municipality," and "municipality" as including "an Indian tribe." *Id.* (citing 42 U.S.C. §§ 300j-9(i)(1)©, 300f(12), 300f(10) (1994)). *See also Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73-74 (2000) (finding that Congress had abrogated state sovereign immunity under the ADEA because the statute allowed suit against "employers (including a public agency)," and state and federal governments were specifically included in the statute's definition of "public agencies").

Here, 8 U.S.C. § 1324b appears to resemble more closely those statutes that have been found to lack an express waiver of tribal sovereign immunity. Most clearly, on its face, § 1324b contains no explicit reference to Indian tribes. Unlike the Safe Water Act assessed in *Osage*, it contains no definitional provisions that can be found to apply to the tribes. 187 F.3d at 1181-82. Further, unlike the Bankruptcy Act interpreted in *Krystal Energy Co.*, it contains no language referring to "nations," "governments," or any kind of "abrogation." 357 F.3d at 1058. Rather, § 1324b simply applies to "a person or other entity." § 1324b(a)(1). This language is far more general than that evaluated in *Osage* and *Krystal Energy Co*. Although § 1324b's terms are broad and otherwise all-encompassing, no part of them could reasonably be interpreted to refer *expressly* to Indian tribes; none of these words suggest that the statute intends to allow suit against governmental entities that would otherwise be immune, *compare Krystal Energy Co.*, 357 F.3d at 1058 ("government"), *Kimel*, 528 U.S. at 73-74 ("public agency").[3] Therefore, although some indications favor an interpretation that Congress intended to allow private suit against Indian tribes under § 1324b, the statutory language probably does not indicate that intent specifically enough to effectively abrogate tribal immunity. Therefore, if the proper Respondent is GTB or one of its business entities, it may not be sued by a private individual for retroactive monetary damages.

B. Identity of the Respondent

The crux of the remaining analysis, then, is the true identity of the proper Respondent. To resolve

[3] Notably, § 1324a does contain language that could possibly be amenable to an abrogation analysis. That section specifically defines a covered "entity" to include "an entity in any branch of the Federal Government." § 1324a(a)(7). However, for several reasons, this definition could not be used to abrogate tribal sovereign immunity under § 1324b. First, the definition applies "for purposes of this section," implying that "entity" does not include the Federal Government under other sections. *Id.* Additionally, even if § 1324a's definitions were to apply to § 1324b, Indian tribes are "domestic dependent nations," separate from the Federal Government, even if subject to its control. *Potawatomi*, 498 U.S. at 509.

this matter, two questions must be answered: (1) which entity is actually responsible for the employees who took the allegedly discriminatory actions at issue? and (2) is that entity in fact an Indian tribe or a business entity run by such a tribe?

First, the pleadings present a great deal of factual confusion about the identity of the Respondent. Mr. Alhameed initially named "Grand Traverse Resort & Casinos" in his original charge and complaint, but he later states that the Economic Development Corporation (EDC) is the proper Respondent. However, he also names the Grand Traverse Band itself as a potential respondent, and he makes reference to its Governmental Services department, where he now seeks employment. Furthermore, at various points in the complaint and comments, Mr. Alhameed mentions a plethora of other entities with which he has interacted: Leelanau Sands Casino, Turtle Creek Casino, GTB Motel, and Eagletown Market. Respondent, on the other hand, contends that Grand Traverse Resort & Casinos is not a legal entity, and that the real party in interest is the Grand Traverse Band of Ottawa and Chippewa Indians, which is the sole shareholder of the Grand Traverse Band Economic Development Corporation (EDC). Respondent alleges that EDC, in turn, is the "single member owner" of the Grand Traverse Resort & Spa, LLC, a Michigan LLC. Without further information and evidence, it is unclear which of these entities actually controls the employees that took part in the relevant transactions with Mr. Alhameed. Thus, it is impossible to determine which entity is the proper Respondent, and in turn, which entity's potential immunity should be evaluated.

Second, the parties have not yet submitted any evidence that demonstrates whether or not the business entities (such as EDC and the Grand Traverse Resort & Spa, LLC) are actually tribe-run. As discussed above, tribe-run entities possess sovereign immunity to the extent that the tribe itself does, so this question is crucial to a determination of immunity. Because this issue is one of subject matter jurisdiction, it is appropriate to consider a broad range of evidence outside the pleadings, including affidavits and other relevant documents. *See generally Land v. Dollar*, 330 U.S. 731, 734-35 (1947); *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 989-90 (7th Cir. 2000)(finding that factual claims affecting jurisdiction may be investigated once jurisdiction has been called into question). Without evidence of the relevant business entities' relationship to GTB itself, the issue of Respondent's sovereign immunity cannot be resolved.

III. INQUIRIES

Respondent is requested to file:

1. A statement explaining the nature of each entity named in this order, Mr. Alhameed's complaint and comments, and GTB's answer. Respondent should describe the identity of each entity, explaining specifically how each relates to GTB, and provide evidence sufficient to establish that relationship.

2. Evidence sufficient to establish which entity employs, or employed at the time of the incidents giving rise to the charge at issue, the individuals mentioned by Mr. Alhameed in his complaint, as well as any other individuals who were involved in making the relevant employment decisions.

SO ORDERED.

Dated and entered this 25th day of September, 2008.

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Ellen K. Thomas
Administrative Law Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

October 22, 2008

QAIS IBRAHIM ALHAMEED, Complainant, v. GRAND TRAVERSE RESORT & CASINO, Respondent.	))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 08B00030

ERRATA

In my Order of Inquiry on September 25, 2008:

1) The text on page 4 that reads

> (citing Kiowa Tribe, 523 U.S. at 754-755) (emphasis original).

is hereby corrected to read

> (citing *Kiowa Tribe*, 523 U.S. at 754-755) (emphasis original).

2) The text on page 4 that reads

> Potawatomi, 498 U.S. at 509

is hereby corrected to read

> *Potawatomi*, 498 U.S. at 509

3) The text on page 4 that reads

(citing *Atascadera State Hosp. v. Scanlon*, 473 U.S. 234, 242) (1985)).

is hereby corrected to read

(citing *Atascadera State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

4) The text on page 5 that reads

9(i)(1)©, 300f(12)

is hereby corrected to read

9(i)(1)(c), 300f(12)

5) The text on page 6 on the tenth and eleventh lines that reads

the Grand Traverse Band Economic Development Corporation (EDC).

is hereby corrected to read

EDC.

SO ORDERED.

Dated and entered this 22nd day of October, 2008.

Ellen K. Thomas
Administrative Law Judge