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

January 6, 2009

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

FINAL ORDER AND DECISION

I. BACKGROUND AND PROCEDURAL HISTORY

This is a case arising under the nondiscrimination provisions 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), in which Qais I. Alhameed, a citizen of the Hashemite Kingdom of Jordan and a United States permanent resident, filed a complaint alleging that the Grand Traverse Resort & Casinos engaged in unfair immigration-related employment practices when it fired and/or refused to hire him based on his citizenship status and national origin and required him to provide more or different documents than necessary to prove his work eligibility for purposes of § 1324a(b).

No answer was made by the named respondent, but the Grand Traverse Band of Ottawa and Chippewa Indians (GTB) filed a timely answer denying the material allegations and asserting that the Band itself was the proper respondent because "Grand Traverse Resort & Casinos" was a marketing program rather than a legal or business entity. GTB asserted that as an Indian tribe, it enjoys sovereign immunity from suit by private individuals, and that Alhameed's case should therefore be dismissed. Other affirmative defenses were asserted as well. No exhibits accompanied the answer.

Alhameed filed a response to the answer and reaffirmed his factual allegations. He also asked that his case be retained and said that the employment application and other forms he filled out named both the Grand Traverse Band of Ottawa and Chippewa Indians and the Grand Traverse Resort & Casinos at the top of the forms, and that the discrepancy in naming the right respondent should not be held against him. He said that there were several different entities at which the respondent

offers employment, including Governmental Services, Turtle Creek Casino, Leelanau Sands Casino/Grand Traverse Resort & Casinos, Economic Development Corporation, the GTB Motel, and Eagletown Market.

The specific job at issue in this proceeding was at the Leelanau Sands Casino, and Alhameed said he believed Leelanau Sands Casino/Grand Traverse Resort and Casinos, Economic Development Corporation should be the respondents. He argued that even if GTB is a sovereign nation, it should still have to comply with federal laws when it employs persons outside the tribe. Accompanying the response were exhibits: 1) copies of Alhameed's visa, social security card, and Michigan driver's license; 2) a copy of Alhameed's passport; 3) an employment application captioned Grand Traverse Resort & Casinos; 4) the second page of the employment application; and 5) Disclosure to Employment Applicant Regarding Procurement of Consumer Report, captioned Grand Traverse Band of Ottawa and Chippewa Indians, and Grand Traverse Resort & Casinos.

Because of the lack of clarity about the relationships among the various entities named, I issued an Order of Inquiry to develop the record and explore certain factual issues to ascertain 1) which entity was actually responsible for the alleged discriminatory actions at issue, and 2) whether that entity was protected by tribal sovereign immunity. GTB filed a response, together with attachments: A) the Constitution of the Grand Traverse Band of Ottawa and Chippewa Indians (21 pages); B) Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 76 Fed. Reg. 18553-18557 (April 4, 2008) (5 pages); C) documents captioned 15 GTBC §§ 204-401, Chapter 2 - GTB Economic Development Corporation - Federal Charter of Incorporation, Part 1 - Corporate Identity and Status, §§ 201-268 (21 pages); D) a Federal Charter of Incorporation Issued by the United States of America, Department of the Interior, Bureau of Indian Affairs to the Grand Traverse Band of Ottawa and Chippewa Indians for the Grand Traverse Band Economic Development Corporation, A Federally Chartered Tribal Business Corporation, signed by Kevin Gover, Assistant Secretary of the Department of the Interior for Indian Affairs, and dated October 23, 1998 (20 Pages); E) Statement of Grand Traverse Band Regulator, with attachments consisting of a letter to the Regulator dated May 29, 2007 from the National Indian Gaming Commission, with copies of compliance reports, gaming licenses, and Commission minutes (11 pages); F) Statement of Corporate Officer, signed by Jim McWilliams, Chief Financial Officer for GTB EDC, dated Oct. 14, 2008 (2 pages); G) GTB EDC Resolution #03-015 dated April 30, 2003; H) Articles of Organization and Bylaws for Grand Traverse Resort & Spa, LLC (8 pages); I) Position Description for Human Resources Recruiter dated March 27, 2002, and captioned Grand Traverse Resort & Casinos, Economic Development Corporation (3 pages); J) Position Description for Human Resources Recruiter, revised July 2006 and captioned Grand Traverse Band of Ottawa and Chippewa Indians (3 pages); K) Position Description for Director of Human Resources, revised February 2008 and captioned Grand Traverse Band of Ottawa and Chippewa Indians (4 pages); L) Position Description for Director of Human Resources, dated February 2008 and captioned Grand Traverse Resort & Casinos,

Economic Development Corporation (5 pages); and M) Position Description for Background Investigator - Government, revised October 2004 and captioned Grand Traverse Band of Ottawa and Chippewa Indians (2 pages).

II. DISCUSSION

A. Sovereign Immunity as a Jurisdictional Issue

Case law in the Supreme Court and in the Sixth Circuit, in which this case arises, has frequently characterized the question of sovereign immunity as a jurisdictional issue. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (finding that "the Eleventh Amendment sufficiently partakes of the nature of a jurisdictional bar"); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998) (discussing the origins of tribal sovereign immunity and comparing it to the United States' lack of jurisdiction over a foreign state); *Angel v. Kentucky*, 314 F.3d 262, 265 (6th Cir. 2002) (referring to state sovereign immunity as a jurisdictional question); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616, 618 (6th Cir. 2002) (describing an Eleventh Amendment defense as a "jurisdictional issue").

The Supreme Court has nevertheless stated in dicta that whether Eleventh Amendment immunity involves an issue of subject-matter jurisdiction is "a question we have not decided." *Wisc. Dep't of Corrs. v. Schact*, 524 U.S. 381, 391 (1998). *Cf. Calderon v. Ashmus,* 523 U.S. 740, 745 n.2 (1998) (although sovereign immunity limits a federal court's power, it is not coextensive with the limitations in Article III). The Sixth Circuit has similarly distinguished between subject matter jurisdiction and questions of sovereign immunity. *See Kovacevich v. Kent State Univ.*, 224 F.3d 806, 816 (6th Cir. 2000) (stating that sovereign immunity is not jurisdictional "in the same sense" as subject matter jurisdiction). The two types of "jurisdiction" differ in several important ways, the most relevant of which is that a sovereign may waive the immunity defense, whereas subject matter jurisdiction is never waivable by the parties. *Nair v. Oakland County Comm. Mental Health Auth.*, 443 F.3d 469, 474-75 (2006). The potential for "one party's litigation conduct - the sovereign's - [to] alter the existence of federal court jurisdiction" has led the Sixth Circuit to decide that, unlike true subject matter jurisdiction, sovereign immunity need not necessarily be treated as a threshold issue. *Id.* at 476.

Acknowledging that the circuit has "not spoken with one voice on whether [it] must, or whether [it] may, resolve a sovereign-immunity defense before addressing the merits," *id.* at 474, *Nair* points to a conflict as well among the circuits as to whether the immunity question must be resolved at the outset, *id.* at 475 (collecting cases). *Nair* held that where the government-sovereign does not raise the defense of sovereign immunity as a threshold issue, the court has discretion to address the merits and the immunity issue in whatever order it prefers. *Id.* at 476. The court's rationale turned on the fact that sovereign immunity is waivable, explaining that "a State that has authority to waive the broader question (of whether it is amenable to suit at all) . . . has authority to waive the narrower question (of whether a court must address a sovereign-

immunity defense before the merits.)" *Id.* Whether or not the court may choose to address the merits before reaching the question of immunity thus turns on the sovereign's intent.

It is not always clear, however, when a sovereign has raised its immunity as a threshold issue, or under what circumstances the sovereign will be found to have waived its opportunity to do so. Generally speaking, the sovereign must assert an immunity defense at the earliest possible opportunity, urging it as the first dispositive issue to be considered. *Nair*, for example, found that raising Eleventh Amendment immunity as an alternative ground for affirming the district court's decision to dismiss did not assert sovereign immunity as a threshold defense. *Id.* at 477. The court strongly implied that the only sure way to do so was by way of a motion to dismiss. *Id.* at 476-77. Other cases in the circuit have held in similar circumstances that a state did not raise sovereign immunity as a threshold issue, *Lambert v. Hartman*, 517 F.3d 433, 438 (6th Cir. 2008) (immunity not raised in the trial court, but asserted as alternative grounds for affirmance). Similarily, immunity was not raised initially where it was expressly reserved and the state requested that it be addressed only if it did not prevail on its statute of limitations defense, *Nat'l Parks Conservation Ass'n, Inc. v. TVA*, 480 F.3d 410, 416 (6th Cir. 2007). Immunity should thus be treated as a threshold issue in the circuit only when the sovereign raises it early in the case, and where the sovereign indicates an intent that the case be dismissed without consideration of the merits.

Here, the Band raised sovereign immunity as the second of three affirmative defenses, asserting that it was the proper respondent, that it was immune from private suit, that it had not waived its tribal sovereign immunity, and that Alhameed's case should therefore be dismissed. By raising sovereign immunity in the answer and requesting dismissal on that basis, GTB did all that was necessary to demonstrate an intent that the issue be addressed at the outset. Asserting other merits-based defenses in the alternative does not negate this intent; a respondent need not stake its entire case on one ground for dismissal in order to request that immunity be addressed first. The issue of GTB's tribal sovereign immunity must therefore be addressed before the merits of Alhameed's case may be reached.

B. Tribal Sovereign Immunity from Private § 1324b Claims

As explained in *In Re Investigation of Miccosukee Resort & Convention Ctr.*, 9 OCAHO no. 1114, 4 (2004),[1] 8 U.S.C. § 1324b is a law of general applicability, and does not fall within any of

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[1] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw

(continued...)

the exceptions that might render it inapplicable to Indian tribes, *see Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115-16 (9th Cir. 1985). Thus, § 1324b applies both to tribes and to their subsidiary business entities. *See id.* at 1116-17. As noted in the Order of Inquiry, however, Indian tribes and their subsidiary tribe-run entities nevertheless ordinarily enjoy sovereign immunity from private lawsuits brought under 8 U.S.C. § 1324b. *Alhameed v. Grand Traverse Resort and Casinos*, 10 OCAHO no. 1126, 4 (2008).

The general rule is that Indian tribes and tribe-run entities are immune from private suit "absent a clear waiver by the tribe or congressional abrogation." *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 509 (1991) (*citing Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). GTB made crystal clear in its answer that it did not intend to waive tribal sovereign immunity, and nothing in the language of § 1324b suggests that Congress intended that statute to abrogate sovereign immunity, whether for Indian tribes or for other sovereign entities. To abrogate immunity, Congress must "mak[e] its intention unmistakably clear in the language of the statute," and this intent must be made especially clear where tribal rights are concerned. *Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1131 (11th Cir. 1999).

Section 1324b makes no reference at all to Indian tribes or to other sovereign governmental entities. The Tenth Circuit has held that absent such a reference, no intent to abrogate a state's Eleventh Amendment immunity can be found in § 1324b. *Hensel v. Office of the Chief Admin. Hearing Officer*, 38 F.3d 505, 508 (10th Cir. 1994). A similar result was reached summarily by another circuit in *Elhaj-Chehade v. Office of the Chief Administrative Hearing Officer*, 235 F.3d 1339 (5th Cir. 2000). Both *Hensel,* 38 F.3d at 508-510, and *General Dynamics Corp. v. United States*, 49 F.3d 1384, 1386-87 (9th Cir. 1995) similarly found that federal agencies were not amenable to private suits under § 1324b either. *Cf. Shen v. DLI*, 9 OCAHO no. 1117, 3 (2005). There appears no logical reason why the tribal sovereign immunity at issue in this case should be treated any differently.

C. Identity and Status of the Potential Respondents

If the various entities involved in this case are all tribal businesses and ventures, then all the potential respondents are immune from private suit under § 1324b, and Alhameed's case must be dismissed. In response to the inquiry about the status of the various entities involved in the actions underlying this case, GTB filed a response with documentary evidence to show how each of the entities named relates to GTB.

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[1](...continued)
database "FIM-OCAHO" or on the website at (http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published).

1. Grand Traverse Band of Ottawa and Chippewa Indians

GTB's Attachment A, the tribe's constitution, reflects that the document was adopted under the authority of the Indian Reorganization Act of June 18, 1934, (48 Stat. 984), as amended. The constitution creates a tribal council with all of the sovereign powers of the tribe, as well as a tribal court system. Article XIII provides that the tribal council may not waive or limit the tribe's immunity from suit except as authorized by the constitution, or in furtherance of tribal business enterprises by a resolution approved by 5 of the 7 members of the council. Section 2(d) asserts that,

> The Band, however, by this Article, does not waive or limit any rights which it may have to be immune from suit in the courts of the United States or of any state.

Attachment B, a Federal Register notice from the Bureau of Indian Affairs, lists 562 tribal entities which are eligible to receive services from the Bureau by virtue of their status as Indian tribes. GTB is one such entity. GTB asserts that it has been a federally-recognized Indian Tribe since 1980.

2. Grand Traverse Band Economic Development Corporation

GTB's Attachments C and D deal with the creation and status of the Economic Development Corporation, the Federal Charter of Incorporation for which was executed by Kevin Gover, Assistant Secretary of the United States Department of the Interior for Indian Affairs, on October 23, 1998, to be effective upon ratification by the Tribal Council. Article III provides that while the Corporation is wholly owned by GTB, nothing in the Charter should be deemed to waive or to permit the Corporation to waive GTB's sovereign immunity. Article VII provides that while the Corporation is clothed with the same privileges and immunities as GTB, it cannot waive GTB's immunity and can waive its own immunity only by express resolutions of both the Corporation and the GTB Tribal Council after consultation with the Tribe's attorneys. Such waivers are disfavored and to be granted only under very limited circumstances.

The charter reflects that the general purposes of the Corporation include engaging in various business enterprises and promoting the economic development of the Band. Specific purposes include the operation of "the class II and class III gaming enterprises (IGRA,[2] 25 U.S.C. 2701 et seq.) of the Grand Traverse Band and related activities."

3. Leelanau Sands Casino and Turtle Creek Casino & Hotel

GTB's Attachment E, the statement of the GTB Regulator, reflects that GTB is the owner of Leelanau Sands Casino and Turtle Creek Casino, and that the Grand Traverse Band Gaming Commission "is a governmental subdivision of the Tribe and the primary regulator of Tribal

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[2] The reference is to the Indian Gaming Regulatory Act. Regulations promulgated pursuant to the Act are found at 25 C.F.R. 501 et seq. (2008).

Gaming Operations." Accompanying the statement are compliance reports and copies of the class II and class III licenses for both casinos.

4. The Lodge and Eagletown Market

Attachment F, the statement of corporate Officer Jim Williams, Chief Financial Officer for EDC, dated October 14, 2008, asserts that GTB-EDC,

> owns and operates the following businesses under the marketing name of Grand Traverse Resort & Casinos: Turtle Creek Casino & Hotel, Leelanau Sands Casino, Eagletown Market, The Lodge, and Grand Traverse Resort & Spa, LLC. Except for the Grand Traverse Resort and Spa, LLC, each of the foregoing businesses are operated as units and a division of the GTB-EDC, and, as such, have no independent corporate standing and power.

5. Grand Traverse Resort & Spa, LLC

Attachment G is a resolution adopted at a special session of the EDC Board on April 30, 2003 and captioned as Resolution #03-015, which ratifies the formation of Grand Traverse Resort & Spa, LLC, as a Michigan single-member limited liability company, and recites that the LLC is a wholly owned subsidiary of EDC. Attachment H includes portions of the Articles of Organization filed with the state of Michigan and a copy of the company's bylaws.

6. Grand Traverse Resort & Casinos

As reflected in Attachment F, the statement of EDC's Chief Financial Officer, Grand Traverse Resort & Casinos is the marketing name under which EDC operates the Turtle Creek Casino & Hotel, the Leelanau Sands Casino, the Eagletown Market, and The Lodge. The statement says that those businesses "are operated as units and a division of the GTB-EDC, and, as such, have no independent corporate standing and power."

7. Employees

GTB also provided position descriptions for the jobs of the employees named in the complaint or involved in the events giving rise to the complaint (Attachments I-M). All the descriptions listed either Grand Traverse Resort & Casinos, Economic Development Corporation or Grand Traverse Band of Ottawa and Chippewa Indians as the employer.

III. CONCLUSION

It is evident that each of the potential respondents named in this matter is clothed with immunity from private suits under § 1324b. GTB is an Indian tribe; EDC is a tribal corporation which owns

and operates both casinos, the Eagletown Market, and The Lodge; and Grand Traverse Resort & Spa, LLC, is a wholly owned subsidiary of the EDC. Grand Traverse Resort & Casinos is simply the marketing name under which EDC operates various business enterprises.

GTB raised its tribal sovereign immunity at the earliest possible opportunity, indicating its intent that the issue be addressed before the merits. Because Congress has not expressly abrogated tribal sovereign immunity under 8 U.S.C. § 1324b, Indian tribes are immune from private lawsuits under that statute, and Alhameed's complaint must be dismissed.

ORDER

The complaint is dismissed.

SO ORDERED.

Dated and entered this 6th day of January, 2009.

Ellen K. Thomas
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2009, I have served copies of the foregoing Final Order and Decision on the following persons at the addresses indicated:

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