

department had statutory authority to promulgate the rule, and that such authority was not an unconstitutional delegation of legislative authority. We therefore affirm.

The facts are undisputed. Black & Decker terminated Gwendolyn Smith's employment on or about August 5, 1985. Smith filed a complaint with the department alleging age and handicap discrimination. The department conducted an investigation and found no probable cause to believe discrimination had occurred. Smith appealed the no probable cause determination under Wis. Adm. Code, sec. Ind. 88.08. A hearing examiner found probable cause to believe discrimination on the basis of "possible handicap" had occurred. Black & Decker petitioned for review, but was advised that review was unavailable until after findings were made on the merits of the complaint.

Black & Decker then commenced an action seeking a declaratory judgment that Wis. Adm. Code, sec. Ind. 88.08 is invalid. The trial court concluded that the facts were undisputed, and held that the rule was valid.

Wisconsin Adm. Code, sec. Ind. 88.07 provides that at the conclusion of an investigation (which is conducted ex parte by an investigator), the department shall issue a

determination as to whether there is probable cause to believe that discrimination occurred. If the finding is one of no probable cause, the department shall notify the parties of the complainant's right to appeal under Wis. Adm. Code, sec. Ind. 88.08. Wisconsin Adm. Code, sec. Ind. 88.08 provides that a complainant may request a hearing on the issue of probable cause if a no probable cause determination has been made following an investigation of a complaint. Black & Decker argues that the statutes do not provide the department with authority to promulgate this rule.

"[A]n administrative agency has only those powers which are expressly conferred or which are fairly implied from the statutes under which it operates." Peterson v. Natural Resources Board, 94 Wis.2d 587, 592, 288 N.W.2d 845, 848 (1980). "An administrative agency may not issue a rule that is not expressly or impliedly authorized by the legislature." Id. at 593, 288 N.W.2d at 848. Since the facts are undisputed, the question is one of law which we review without deference to the trial court's decision. First Nat. Leasing Corp. v. Madison, 81 Wis.2d 205, 208, 260 N.W.2d 251, 253 (1977).

Black & Decker contends that the statutes do not expressly allow the department to provide the right to a hearing on a finding of no probable cause. We agree. However, we conclude the statutes implicitly grant the department authority to create such a right.

Section 111.375(1), Stats., provides that, with one exception not relevant here, the fair employment act shall be administered by the department, and that "[t]he department may make, amend and rescind such rules as are necessary to carry out this subchapter."

Section 111.39(1), Stats., provides that the department may receive and investigate complaints charging discrimination. Section 111.39(2) provides that the department and its agents are empowered to hold hearings, take testimony and make investigations in the manner provided in ch. 101, Stats. Section 111.375(1) also gives the department authority to conduct any "proceeding, hearing, investigation or inquiry necessary to the performance of its function."

The statutes allow the department to issue rules necessary to carry out the fair employment act. One of the requirements of the act is that the department investigate

complaints. Sec. 111.39(1), Stats. The department is permitted to conduct any hearing necessary to perform its functions. Sec. 111.375(1). By implication, the department may conduct hearings to investigate complaints. These statutes implicitly authorize the department to adopt Wis. Adm. Code, sec. Ind. 88.08, which provides for a hearing in the investigative stage of the proceedings.

Black & Decker contends that the hearing under Wis. Adm. Code, sec. Ind. 88.08 conflicts with sec. 111.375(1), Stats., which requires the department to preserve a complainant's anonymity until it has made a probable cause determination. Section 111.375(1) also provides that anonymity is not required if it will substantially impede the investigation. If a complainant requests a hearing, there can be no doubt that anonymity would impede the investigation. We see no conflict between Wis. Adm. Code, sec. Ind. 88.08 and the requirement of anonymity.

Black & Decker contends that because sec. 111.39(4)(b), Stats., directs a hearing on the merits of a complaint if the department finds probable cause, this implies that the department must dismiss the complaint if it

does not find probable cause. We disagree. The statutes do not define how the department must investigate complaints. It is expressly granted authority to hold hearings to perform its functions. This implies that it can hold a hearing after an initial finding of no probable cause.

Black & Decker next contends that if the legislature had delegated to the department authority to promulgate the rule, such a delegation would be unconstitutional, relying on State ex rel. Warren v. Nusbaum, 59 Wis.2d 391, 208 N.W.2d 780 (1973). The rule regarding delegation of legislative authority was stated as follows:

The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall operate, -is a power which is vested by our constitutions in the legislature and may not be delegated. When, however, the legislature has laid down these fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose

Id. at 440, 208 N.W.2d at 809, quoting State ex rel. Wis. Inspection Bureau v. Whitman, 196 Wis. 472, 505, 220 N.W. 929, 941 (1928) (citations omitted).

By stating that certain forms of discrimination are unlawful, sec. 111.321, Stats., and that it intends to protect certain employment rights, sec. 111.31(1), (2), the legislature has declared that there should be a law and the law's general purpose and policy. It has declared that the department is to make rules to carry out the chapter, and that the department has the powers and duties under sec. 111.39, thereby fixing the limits within which the department must act. The legislature has provided that the department may investigate complaints, sec. 111.39(1), but has not specified the procedure to be used. The department's adoption of Wis. Adm. Code, sec. Ind. 88.08 is pursuant to its mandate to enact rules necessary to carry out the act. We see no unlawful delegation of legislative authority.

Black & Decker's final contention is that Wis. Adm. Code, sec. Ind. 88.08 conflicts with the legislature's statutory framework for appeals under the fair employment act and for judicial review under ch. 227, Stats. While the rule is entitled "Appeals of Initial Determinations of No

Probable Cause," it, in fact, provides a hearing on the issue of probable cause. Nothing in the act expressly or implicitly prevents the department from carrying out its function of investigating complaints by holding hearings.

Further, even absent Wis. Adm. Code, sec. Ind. 88.08, a complainant arguably would have a right to request a hearing upon a finding of no probable cause under sec. 227.42(1), Stats., since a substantial interest would be threatened by agency action or inaction, there is no evidence of legislative intent that the interest not be protected, the injury is different from injury to the general public and there is a dispute of material fact. Proceedings under the fair employment act are subject to the full and fair hearing due process provisions of ch. 227. Kropiwka v. DILHR, 87 Wis.2d 709, 714, 275 N.W.2d 881, 884, cert. denied, 444 U.S. 852 (1979). Contrary to Black & Decker's assertion, sec. 227.42(1) provides for an agency hearing, not judicial review. Wisconsin Adm. Code, sec. Ind. 88.08 does not conflict with these statutes.

By the Court.--Judgment affirmed.

Publication in the official reports is not recommended.