IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EDITH VANCE, an individual,	)	**No. 27971-5-III**
Appellant,	)	
v.	)	
	)	**Division Three**
STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, DEPARTMENT OF LABOR AND INDUSTRIES,	)	
Respondents.	)	**UNPUBLISHED OPINION**

Sweeney, J. — This appeal follows a suit by an employee against her employer for negligent infliction of emotional distress. The employee, a social worker for the Washington State Department of Social and Health Services, was attacked and injured by a man when she attempted to remove a child from his home. She sued and claimed that her employer negligently handled the aftermath, when she returned to work. We conclude that the conduct of her employer, negligent or not, falls within the protection afforded an employer by Washington's Industrial Insurance Act, Title 51 RCW. And we,

therefore, affirm the dismissal of her suit.

FACTS

This suit was resolved on a motion for summary judgment. So our review of the facts is in a light most favorable to the losing party, Edith Vance. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); *Leonard v. Pierce County*, 116 Wn. App. 60, 64, 65 P.3d 28 (2003). Ms. Vance works as a caseworker for the Department of Social and Health Services (DSHS), Child Protective Services (CPS) division, in the area around Ferry County and Stevens County. Ms. Vance visited a home with caseworker Sandra Kirk and a Ferry County sheriff's detective to take a child into protective custody. A man at the house attacked Ms. Vance with a machete. The detective shot and killed the assailant. The assault left Ms. Vance with physical injuries and post traumatic stress disorder (PTSD).

The Washington State Department of Labor and Industries (L&I) paid benefits to Ms. Vance for time loss, medical care, and prescription medication. Ms. Vance also received a permanent partial disability award.

Ms. Vance alleges, however, that she suffered a financial loss because she had to pay for medical expenses that were not covered by L&I and had to use her sick leave and flex time. Ms. Vance's supervisors assured her that DSHS would "take care of" her; one

supervisor told her that she did not need to take sick leave. Ms. Vance believed this meant that the State would pay for medical expenses and time loss that L&I did not cover.

Ms. Vance also believed she was treated differently from Ms. Kirk, the other DSHS caseworker present during the attack. Ms. Kirk did not suffer a physical injury and received three weeks of administrative leave. She did not have to use her sick leave, and she received mileage reimbursement for attending therapy. Ms. Vance was not reimbursed by L&I for the therapy fees or mileage costs because the counselor did not meet L&I standards. DSHS first paid for the counselor but then refused to pay for mileage. Ms. Kirk may have received therapy fee reimbursements to see the same counselor. Ms. Vance then began seeing a counselor who met L&I's standards, and L&I then paid for further therapy and travel.

Ms. Vance also experienced "major psychological strain" as she returned to her work at DSHS, particularly with the prospect of home visits. Her therapist cautioned her against returning to full-time work and CPS casework. Ms. Vance suggested three alternative jobs to her employer. But her supervisors did not offer any of those jobs to her. Ms. Vance claims the supervisors told her the jobs would not be filled. But DSHS eventually hired other people to fill the positions. Instead, DSHS offered Ms. Vance a position that she maintains would have required her to learn a whole new job. The

alternative was for her to return to her caseworker position in Ferry County. Ms. Vance declined the new position and returned to her old position in May 2005.

A few days after her return, she was assigned a high risk case referral. A child welfare services supervisor intervened on Ms. Vance's behalf and protested the assignment. Ms. Vance was also expected to work full time instead of part time. She has since experienced a bomb threat, a threat by a client who referenced the February 2005 attack, and a physical charge by a different client. Ms. Vance told a supervisor in December 2007 that she needed help getting a position that did not require field work. He responded, or at least implied, that Ms. Vance would have to file a grievance to get a different position. Ms. Vance believed the supervisor had previously accommodated other employees with different jobs without requiring a grievance.

Ms. Vance has sought accommodation for her PTSD. She requested voice recognition software to help her use a computer because she anticipated a hand surgery after she returned to work in 2005. She needed the hand surgery because of the 2005 attack. The software program was made available but not until after the surgery, when she was one week from being medically cleared to type again. Ms. Vance did not formally request an accommodation for her hand injury. And she revoked her oral request for the software after her surgery.

Ms. Vance sent a written grievance to a supervisor in July 2005 about the delay in receiving accommodations for her physical injuries and the department's failure to address her PTSD-related needs. The supervisor responded by sending Ms. Vance a copy of a job announcement for a Jewish organization: "Edith, I thought you might be interested in seeing this. Hope you are doing well." Clerk's Papers (CP) at 75. Ms. Vance is Jewish. This reference to her religion was not the first in the course of her employment with DSHS. In approximately 2001, another supervisor sat down at Ms. Vance's desk and told her, "[Y]ou are the first Jew I ever met." CP at 69, 121. In another instance, Ms. Vance wished to join a DSHS emergency response team. But the training was held over the Jewish holiday, Rosh Hashana, and her employer refused Ms. Vance's request to leave two hours early on the last day of the training to be able to return home before sunset. Ms. Vance also reported hearing that the same supervisor who forwarded the job announcement had warned her colleague to "quit acting like a Jewish Mother." CP at 121-22. Another employee was told to remove her Jewish-oriented posters from her workspace.

Ms. Vance recently received medical confirmation that her PTSD symptoms have been exacerbated by her supervisors' treatment and by a later assault—a client charged at her during a field visit.

Ms. Vance sued the State in August 2007. She alleged negligence, gross negligence, gross violation of employment policies and procedures with regard to State employees, reckless infliction of emotional distress, and religious discrimination. The trial court summarily dismissed all causes of action on the State's motion. Ms. Vance timely appealed dismissal of her claim for negligent infliction of emotional distress only.

DISCUSSION

Immunity Under the Industrial Insurance Act

Ms. Vance contends that she is entitled to proceed with a cause of action for negligent infliction of emotional distress despite the immunity afforded her employer by the Industrial Insurance Act. Whether the Industrial Insurance Act immunizes an employer from a cause of action for negligent infliction of emotional distress is a question of law that we review de novo. *Chea v. Men's Wearhouse, Inc.*, 85 Wn. App. 405, 411-12, 932 P.2d 1261, 971 P.2d 520 (1997).

The Industrial Insurance Act generally prohibits employees from bringing civil suits for injuries or occupational diseases incurred in the course of employment. RCW 51.04.010. This provision also bars negligence-based civil claims that arise out of the claims administration process unless "the claimed injury is too tenuous in its relationship to the underlying workplace injury." *Cena v. State*, 121 Wn. App. 352, 356-57, 88 P.3d

432 (2004).

The statutory bar against civil suits is subject to the narrow exception that a civil action may proceed if the employer deliberately intended to injure the employee. RCW 51.24.020; *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 17-18, 109 P.3d 805 (2005). But negligence is not deliberate intent. *Crow v. Boeing Co.*, 129 Wn. App. 318, 323-24, 118 P.3d 894 (2005). And so the employee must show that when the employer acted, (1) "the employer had actual knowledge that an injury was certain to occur" and (2) the employer "willfully disregarded that knowledge." *Birklid v. Boeing Co.*, 127 Wn.2d 853, 865, 904 P.2d 278 (1995). That showing has not been made here.

Ms. Vance's complaints relate to her leave time and health benefits following her injury. She was compensated by L&I for her PTSD. And she has characterized her present psychological problems as a continuation and exacerbation of her 2005 injury. *See McCarthy v. Dep't of Soc. & Health Servs.*, 110 Wn.2d 812, 816, 759 P.2d 351 (1988).

Her claim is for negligent rather than intentional infliction of emotional distress. So her characterization of the claim brings it within the immunity afforded her employer by the Industrial Insurance Act. Ms. Vance was deeply hurt and disturbed by what she perceived as the employer's disparate treatment. And she certainly suffered

psychological injuries during the attack that have since been exacerbated. But none of this provides a basis to avoid the immunity afforded her employer without a showing that the employer deliberately intended to injure her. *Crow*, 129 Wn. App. at 323-24.

We affirm the summary dismissal of her suit.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Kulik, C.J.

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Korsmo, J.