STATE OF MICHIGAN

COURT OF APPEALS

ROBIN BOW, Next Friend of COURTNEY BOW, a Minor, Plaintiff-Appellee, v WILLOW RUN COMMUNITY SCHOOLS, Defendant-Appellant.	UNPUBLISHED August 7, 2001 No. 223207 Washtenaw Circuit Court LC No. 98-009410-CZ

Before: Neff, P.J., and O'Connell and R. J. Danhof*, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's judgment entered on the jury verdict in favor of plaintiff in this action brought pursuant to the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*. We reverse and remand.

In December 1996, plaintiff's daughter, Courtney Bow, was a fifth-grade student at Kaiser Elementary School in Ypsilanti. On December 11, 1996,[1] Courtney and the rest of her class were in homeroom waiting to go to another class when substitute teacher Rhonda Walden made an offensive remark to Courtney. According to Courtney's trial testimony, Walden said to her in front of the rest of the class: "Nigger girl, I can tell by your hair you ain't gonna to [sic] get no man."[2] After Walden denied Courtney's request for an apology, she sent the children to their next class.[3]

[1] Courtney testified during trial that she could not recall the exact date of the incident. However, during trial the parties referred to December 11, 1996 as the date of incident in question.

[2] One of Courtney's classmates corroborated Courtney's testimony that Walden made an inappropriate comment to Courtney. It appears from the record that Walden's specific remark to Courtney followed equally questionable comments directed at the entire class. For example, Courtney testified that Walden told the class that "[Walden] got money, and how she got food in her refrigerator and stuff . . . and that whoever got no food in their refrigerator." Courtney's classmate also testified that Walden called the class "hoodrats" and told them "that [the class]

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

As relevant to this appeal, defendant moved for directed verdict at the close of plaintiff's proofs, arguing that the single statement made by Walden to Courtney was insufficient as a matter of law to support a claim under the CRA. The trial court denied defendant's motion for directed verdict, holding that the issue raised by defendant had been decided in an order denying defendant's earlier motion for summary disposition.[4] After a four-day trial, the jury found in favor of plaintiff and the trial court subsequently entered a $38,904.52 judgment against defendant.

On appeal, defendant argues that the trial court erred in denying its motion for directed verdict because plaintiff failed to establish a prima facie case of a hostile educational environment.[5] We review de novo a trial court's decision regarding a motion for directed verdict. *Gauntlett v Auto-Owners Ins Co*, 242 Mich App 172, 176; 617 NW2d 735 (2000). In reviewing a motion for a directed verdict, we are to "review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law should the motion be granted." *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000).

Pursuant to the CRA, a plaintiff alleging racial harassment in the educational setting can prove his claim by establishing a hostile environment. See MCL 37.2103(i)(*iii*); *Malan v General Dynamics Land Systems, Inc*, 212 Mich App 585, 587; 538 NW2d 76 (1995); *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 626-627; 576 NW2d 712 (1998). To establish a claim of hostile environment harassment as contemplated by the CRA, a plaintiff must prove the following elements by a preponderance of the evidence: (1) the individual belonged to a protected group, (2) the individual was subjected to communication or conduct on the basis of race, (3) the individual was subjected to unwelcome racial conduct or communication, (4) the unwelcome racial conduct or communication was intended to or in fact

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gonna be eating chicken scraps while [Walden] gonna be eating like steak." It is worth noting that Courtney and approximately half of her classmates on the day in question were African-Americans and that Walden is also African-American.

[3] The next classroom teacher noted that the students were visibly upset and instead of teaching her lesson that day, she spent the hour trying to sort out what had just occurred. The same day, that teacher spoke to the acting principal about Walden's remarks and she later discussed the incident with the former principal.

[4] Defendant had advanced the identical argument in a prior motion for summary disposition. In its ruling denying defendant's motion for summary disposition, the court held that the single comment made by Walden to Courtney was sufficient to support plaintiff's race discrimination claim.

[5] Plaintiff did not specifically allege a hostile educational environment in the complaint. Rather, plaintiff alleged generally race and sex discrimination in violation of MCL 37.4202(1)(a) (prohibiting discrimination in education), and MCL 37.2302(a) (prohibiting discrimination in relation to public accommodations and services). However, the trial court instructed the jury that plaintiff, in order to prove racial discrimination, was required to demonstrate that Courtney was subjected to a hostile educational environment. Likewise, a review of the jury's verdict form reveals that plaintiff's claim was premised exclusively on a hostile environment theory.

did substantially interfere with the individual's education, or created an intimidating, hostile or offensive educational environment and (5) respondeat superior. See *Chambers v Trettco, Inc*, 463 Mich 297, 311; 614 NW2d 910 (2000); see also MCL 37.2103(i)(*iii*).

At issue is the fourth requirement of a hostile environment harassment claim. As our Supreme Court observed in *Radtke v Everett*, 442 Mich 368, 388; 501 NW2d 155 (1993), whether a hostile environment exists is determined according to "an objective reasonableness standard, not by the subjective perceptions of a plaintiff." Consequently, our inquiry into whether plaintiff established a hostile environment is guided by "objectively examining the totality of the circumstances." *Id.* at 387.

We recognize that a single incident may give rise to a hostile environment claim. *Id.* at 395; *Barbour v Dep't of Social Services*, 198 Mich App 183, 186; 497 NW2d 216 (1993).

> Although rare, single incidents *may* create a hostile environment – rape and violent sexual assault are two possible scenarios. One such extremely traumatic incident may, therefore, fulfill the statutory requirement. Because a single incident, unless extreme, will not create an offensive, hostile, or intimidating [ ] environment, a plaintiff usually must prove that (1) the employer failed to rectify a problem after adequate notice, and (2) a continuous or periodic problem existed or a repetition of an episode was likely to occur. [*Radtke, supra* at 395 (citations and footnote omitted) (emphasis in original).]

In determining whether an environment is hostile as contemplated by the CRA, we are guided by the following factors:

> [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance . . . .[*Quinto v Cross & Peters Co*, 451 Mich 358, 370 n 9; 547 NW2d 314 (1996), quoting *Harris v Forklift Systems, Inc*, 510 US 517, 522-523; 114 S Ct 367; 126 L Ed 2d 295 (1993).]

Plaintiff contends that the derogatory comment Walden made to Courtney is a single incident capable of supporting a hostile environment claim as contemplated by the Court in *Radtke*. We disagree. In our view, by using rape and violent sexual assault as examples of circumstances when a single incident could suffice to create a triable issue of fact regarding a hostile environment claim, the *Radtke* Court demonstrated that claims based on a single incident should be limited to particularly egregious circumstances.[6] Viewed in the light most favorable to

[6] See e.g., *Jones v Clinton*, 990 F Supp 657, 675 (ED Ark, 1998) (recognizing that sexual assault is one of the "exceptional cases" where a single incident will suffice to prove a hostile environment claim); *Fall v Indiana Univ Bd of Trustees*, 12 F Supp 2d 870, 880 (ND Ind, 1998) (single incident of severe physical harassment, "akin to a sexual assault" can support hostile environment claim).

plaintiff, Walden's statement to Courtney in front of her classmates, while most certainly offensive and socially unacceptable, is best characterized as a "mere offensive utterance." *Quinto, supra* at 370 n 9. We do not believe that Walden's comment was of a "type, severity, or duration to have created an objectively hostile [educational] environment."[7] *Quinto, supra* at 370. See *Davis v Monsanto Chemical Co*, 858 F2d 345, 349 (CA 6, 1986) (a plaintiff alleging a racially hostile environment must show "repeated [racial] slurs" to prove that the plaintiff was subjected to an abusive or offensive environment); see also *Allen v Michigan Dep't of Corrections*, 165 F3d 405, 410 (CA 6, 1999).[8]

Given our conclusion that plaintiff's proofs were insufficient as a matter of law to support her claim that Courtney was subjected to a hostile educational environment, we need not address the additional issue raised by defendant on appeal.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Robert J. Danhof

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[7] The fact that Walden also made derogatory comments to the class as a whole does not alter our conclusion.

[8] A review of federal precedent is instructive in determining whether plaintiff established a hostile environment under the CRA. *Radtke, supra* at 394-395; *Quinto, supra* at 370 n 9. See e.g., *Williams v Co of Westchester*, 171 F3d 98, 100-101 (CA 2, 1999) (to establish hostile environment, the plaintiff "must show more than a few isolated incidents of racial enmity; there must be a steady barrage of opprobrious racial comments. [E]vidence solely of sporadic racial slurs does not suffice.") (citations and internal quotation marks omitted); *Bolden v PRC, Inc*, 43 F3d 545, 551 (CA 10, 1994) (two overtly racial comments made by the plaintiff's coworkers were insufficient to be actionable under a hostile environment theory because they were not "pervasive"); *Edwards v Wallace Community College*, 49 F3d 1517, 1521 (CA 11, 1995) (to establish hostile environment, plaintiff had to show that racial slurs spoken by coworkers were "so commonplace, overt and denigrating that they created an atmosphere charged with racial hostility."); *McKenzie v Illinois Dep't of Transportation*, 92 F3d 473, 480 (CA 7, 1996) (three isolated sexually suggestive comments made to plaintiff by coworker did not support hostile environment claim); cf *Snell v Suffolk Co*, 782 F2d 1094, 1103 (CA 2, 1986) (hostile environment established where plaintiff demonstrated continuous pattern of racist epithets and distribution of racially derogatory literature).