# APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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VALARIE DAVIS,

Plaintiff-Appellant,

v.

FIAT CHRYSLER AUTOMOBILES U.S., LLC,

Defendant-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE EASTERN
DISTRICT OF MICHIGAN

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FILED Aug 22, 2018
DEBORAH S. HUNT, Clerk

BEFORE: GIBBONS, BUSH, and LARSEN, Circuit Judges.

JULIA SMITH GIBBONS, Circuit Judge. In 2015, Valarie Davis brought this hostile work environment claim against her employer, Fiat Chrysler Automobile US LLC ("FCA"), alleging violations of Title VII of the Civil Rights Act of 1964 and of Michigan's Elliott-Larsen Civil Rights Act ("ELCRA"). Davis claimed that she had endured discriminatory conduct from co-workers, mainly in the form of displays of and references to monkeys around her office. The district court granted summary judgment for FCA, concluding that Davis was judicially estopped from asserting a hostile

work environment claim because she had not listed the claim as an asset in an earlier bankruptcy proceeding. The district court further concluded that Davis could not succeed on her hostile work environment claim as a matter of law because she had not shown a genuine issue of material fact that any racial harassment was sufficiently severe or pervasive. We agree that judicial estoppel bars Davis's hostile work environment claim here and therefore affirm the district court.

I.

Valerie Davis, an African-American woman, is a clay modeler who has worked for FCA sculpting car models since 2000.[1] In 2004, Davis submitted a letter to her EEOC representative at FCA complaining of actions she considered to be racial discrimination by her co-workers in her then-workspace, Studio 1. Her complaints included that her supervisor made remarks about African-American employees' "kinky hair," that co-workers referred to her as "my little brown friend," and that a co-worker would use a "'monkey calling' device every time [she] would walk by him." DE 13-3, 2004 Letter, Page ID 175. She also claims that she was called "chicky monkey" by her Studio 1 co-workers. DE 1, Compl., Page ID 3. She informed her co-workers that she did not like being referred to as a monkey and complained about these references to her supervisors. (Id. at 2–3.) Following an investigation by FCA into this complaint, Davis did not experience any more racially offensive incidents during the next eight years she worked in Studio 1.

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[1] We recite the facts in the light most favorable to Davis. *See Groening v. Glen Lake Cmty. Sch.*, 884 F.3d 626, 630 (6th Cir. 2018).

On April 30, 2008, Davis filed a petition for bankruptcy under Chapter 13 of the United States Bankruptcy Code and was subject to a five-year bankruptcy plan. The United States Bankruptcy Court for the Eastern District of Michigan issued an order discharging Davis after completion of her Chapter 13 plan on December 10, 2013. In 2012, while still proceeding in bankruptcy, Davis was transferred from Studio 1 to Studio 7/8 at FCA—her current workspace. Incidents at Studio 7/8 form the basis for Davis's complaint in this case.

Davis's alleges that "[a]s recently as 2013, [Davis's] co-workers began to place monkeys in different forms around her cubicle and throughout locations known as studios 7 and 8." DE 1, Compl., Page ID 3. On March 25, 2013, Davis filed a complaint with FCA's diversity office describing offensive behavior by her coworkers across the prior two years, including "her co-workers displaying monkeys." DE 1, Compl., Page ID 3. In her complaint letter to the diversity office, she wrote that there was "a monkey hanging from a cubical with Christmas lights wrapped around it's [sic] neck" in her studio. DE 13-5, 2013 Letter, Page ID 220. In response to this letter, two FCA representatives conducted a walk-through of Studio 7/8 on April 4, 2013. The FCA representatives concluded that the referenced monkey "was a stuffed animal with long arms that could velcro together" and that it "hung from the edge of a cubicle" and that "the Christmas lights did not wrap around its neck." DE 13-6, FCA Memo, Page ID 222. The representatives also noted that they observed a second monkey, an "Ape or a Gorilla," sitting on another designer's overhead cabinet. They concluded that "[n]either monkey[] appeared to be racially offensive in any way." *Id.*

Following this inspection, Davis e-mailed one of the representatives to report that both monkeys were still on display and that she took the matter "very seriously," as "monkeys have been used to depict [African Americans] historically in derogatory terms." DE 14-27, Davis Email, Page ID 952. But, Davis alleges, these monkey displays did not end, and there were "at least 8 to 10 monkeys" on display in her work area between 2013 and January 2015. DE 1, Compl., Page ID 3. Davis filed a discrimination charge with the EEOC on March 10, 2015. She received notice of the EEOC's decision to close its file on her charge and was issued a right to sue letter on August 20, 2015. Davis then filed this hostile work environment lawsuit on October 26, 2015, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and of Michigan's Elliot-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101 *et seq.*,.

The district court granted summary judgment for FCA. It concluded, after holding oral argument, that because Davis had not listed her potential hostile work environment claim against FCA as an asset in her bankruptcy proceeding, she was judicially estopped from bringing her claims here. The district court further held that Davis's Title VII and ELCRA hostile work environment claims failed on the merits, as she had not shown a genuine issue of material fact regarding the severity and pervasiveness of any discrimination; it therefore concluded that FCA was entitled to summary judgment on those grounds as well. Davis then filed this appeal.

## II.

We review a district court's grant of summary judgment de novo. *Kalich v. AT&T Mobility, LLC*,

679 F.3d 464, 469 (6th Cir. 2012). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In considering a motion for summary judgment, the court must "draw all reasonable inferences in favor of the nonmoving party." *Int'l Union v. Cummins, Inc.*, 434 F.3d 478, 483 (6th Cir. 2006) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). But a nonmoving plaintiff must come forward with more than "a scintilla of evidence" in support of its position such that "the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). We then ask "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so onesided that one party must prevail as a matter of law." *Id.* at 251–52. Additionally, "[t]his court reviews de novo the district court's application of judicial estoppel."[2] *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 476 (6th Cir. 2010).

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[2] We addressed the seeming incongruity of applying de novo review to the inherently discretionary decision of a court to apply judicial estoppel in *Lewis v. Weyerhaeuser Co.*, 141 F. App'x 420 (6th Cir. 2005), noting:

> [T]he Supreme Court [in New Hampshire v. Maine] has recently described judicial estoppel as "an equitable doctrine invoked by the court at its discretion." In the Sixth Circuit, "[g]enerally matters that are committed to the sound discretion of the district court are reviewed by the court of appeals for abuse of discretion." *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 465 (6th Cir. 1999). Indeed, a majority of federal courts that have addressed the issue apply the abuse of discretion standard to a district court's

III.

The district court held that Davis was judicially estopped from bringing this hostile work environment claim because she had enough information prior to the closing of her bankruptcy estate to suggest that she had a possible cause of action and therefore had to disclose her possible claims in the bankruptcy proceeding. Davis contends that estoppel was improper because at the time of her bankruptcy estate discharge, she had not yet been subjected to pervasive acts of discrimination at FCA and therefore did not have knowledge of facts

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> application of judicial estoppel. In light of New Hampshire and the extensive contrary authority, we question the continued use of the de novo standard in the context of judicial estoppel.

*Id.* at 423–24 (third alteration in original) (some citations omitted). The court in *Lewis*, however, declined to resolve the issue because it found "the district court's ruling was proper under either standard." *Id.* at 424; *see also Kimberlin v. Dollar Gen. Corp.*, 520 F. App'x 312, 313 n.1 (6th Cir. 2013) (again declining to resolve this question). But our later cases have clarified that the de novo standard is proper for questions of judicial estoppel. *See Mirando v. U.S. Dep't of Treas.*, 766 F.3d 540, 545 n.1 (6th Cir. 2014) ("[B]ecause the Court [in New Hampshire] did not instruct us to review for abuse of discretion, we continue to apply de novo review absent a more definitive statement from the Court."); *see also Lorillard Tobacco Co. v. Chester, Willcox & Saxbe*, 546 F.3d 752, 757 (6th Cir. 2008) ("[T]he Supreme Court [in New Hampshire] did not instruct that an abuse of discretion standard is appropriate, and this Court has continued to adhere to the de novo standard after New Hampshire. Without a more definitive statement from the Supreme Court, this Court is bound by its own precedent and will therefore apply the de novo standard to the district court's order." (citations omitted)).

giving rise to a hostile work environment claim. We agree with the district court that, viewing the evidence in the light most favorable to Davis, she knew enough information about a possible cause of action for discrimination against FCA by December 2013 to trigger her duty to disclose the claim to the bankruptcy court, making the application of judicial estoppel proper. *See White*, 617 F.3d at 478.

Judicial estoppel "is an equitable doctrine invoked by a court at its discretion." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)). Its purpose is "to preserve 'the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship,'" *White*, 617 F.3d at 476 (quoting *Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002)), and it therefore "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase," *New Hampshire*, 532 U.S. at 749 (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227, n.8 (2000)). In the bankruptcy context, judicial estoppel functions to bar "a party from asserting a position that is contrary to one the party has asserted under oath in a prior proceeding, where the prior court adopted the contrary position 'either as a preliminary matter or as part of a final disposition.'" *Eubanks v. CBSK Fin. Grp., Inc.*, 385 F.3d 894, 897 (6th Cir. 2004) (quoting *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1218 (6th Cir. 1990)).

Although "judicial estoppel has not been reduced to a hard-and-fast test," our precedent articulates certain "guiding factors" to consider in

assessing whether judicial estoppel should function to bar a claim. *Haddad v. Randall S. Miller Assocs.*, PC, 587 F. App'x 959, 965 (6th Cir. 2014); *see also New Hampshire,* 532 U.S. at 750 (observing that "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle" (alteration in original) (quoting *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982))). The clearest application of these considerations in the employment discrimination and bankruptcy context in our circuit comes from *White v. Wyndham Vacation Ownership, Inc.*, which indicates that judicial estoppel will bar a claim when (1) a party "assumed a position that was contrary to the one that she asserted under oath in the bankruptcy proceedings," (2) "the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition," and (3) the omission "did not result from mistake or inadvertence." 617 F.3d at 478; *see also Kimberlin v. Dollar Gen. Corp.*, 520 F. App'x 312, 314 (6th Cir. 2013) (applying these factors). The second question—whether the bankruptcy adopted the position—is not at issue in this case. The bankruptcy court confirmed Davis's bankruptcy plan without the potential claim listed as an asset, which is sufficient to satisfy the second consideration. *See White*, 617 F.3d at 479. Our analysis therefore focuses on the remaining two considerations.

1.

A debtor in a Chapter 13 proceeding has a duty to disclose any potential claim as an asset to the bankruptcy court in a schedule of assets and

liabilities. *Lewis*, 141 F. App'x at 424; *see* 11 U.S.C. § 521. This disclosure obligation is ongoing, meaning a debtor has "an express, affirmative duty to disclose all assets, including contingent and unliquidated claims" that arise at any time during the bankruptcy proceeding. *White*, 617 F.3d at 479 n.5 (quoting *In re Coastal Plains, Inc.*, 179 F.3d 197, 207–08 (5th Cir. 1999)). "[T]he disclosure obligations of consumer debtors are at the very core of the bankruptcy process and meeting these obligations is part of the price debtors pay for receiving the bankruptcy discharge." *Lewis*, 141 F. App'x at 424 (alteration in original) (quoting *In re Colvin*, 288 B.R. 477, 481 (Bankr. E.D. Mich. 2003)). And therefore, as this court has recognized, applying judicial estoppel to bar known, potential claims a debtor fails to declare to the bankruptcy court "recognizes the importance of the bankruptcy debtor's affirmative and ongoing duty to disclose assets, including unliquidated litigation interests." *Kimberlin*, 520 F. App'x at 314.

When a debtor has failed to disclose a known potential claim in a bankruptcy proceeding, this court has held that the "omission was equivalent to a statement that there were no such claims." *Stephenson v. Malloy*, 700 F.3d 265, 274 (6th Cir. 2012); *see also Lewis*, 141 F. App'x at 425 ("[P]ursuing a cause of action that was not disclosed as an asset in a previous bankruptcy filing creates an inconsistency sufficient to support judicial estoppel."). Therefore, in such instances, a party will have "assumed a position that was contrary to the one that she asserted under oath in the bankruptcy proceedings," satisfying that prong of judicial estoppel. *White*, 617 F.3d at 478.

Here, Davis acknowledges that she did not list a potential hostile work environment claim against FCA in her schedule of assets and liabilities filed with the bankruptcy court, nor did she ever represent to the bankruptcy court that she might have such a claim before her proceeding terminated in December 2013. But she contends that she did not take a contrary position because she did not know all the facts supporting her hostile work environment claim before her bankruptcy discharge in December 2013. She premises this argument on her contention that there was only one monkey in Studio 7/8 before December 2013—the Christmas-light monkey.[3] But her own assertions in this case belie this claim. Moreover, the test is not whether Davis knew all of the facts that *could possibly* support a claim, but instead whether she had sufficient information to know that she had a possible cause of action against FCA for discrimination before her bankruptcy was discharged. *See White*, 617 F.3d at 479; *Lewis*, 141 F. App'x at 421–22.

Reading the record in the light most favorable to Davis, she had knowledge of a potential discrimination claim against FCA prior to December 10, 2013. Her complaint alleges that "[a]s recently as 2013, [Davis's] co-workers began to place monkeys in different forms around her cubicle" and throughout Studio 7/8; that in March 2013 she

[3] The district court focused in particular on this incident in its judicial estoppel analysis but also cited Davis's claim in her 2013 letter to FCA's diversity office that "racial discrimination [at FCA] resumed around 2012" and her knowledge of and complaints about the earlier racially offensive comments in Studio 1. DE 17, Order, Page ID 1035.

"complained . . . to human resources regarding her co-workers displaying monkeys," including complaining about the Christmas-light monkey; and that in April 2013 she made another complaint "regarding two more monkeys." DE 1, Compl., Page ID 3. In her letter to FCA's diversity office in March 2013 she wrote that she had been dealing with "unprofessional, ignorant, sexist and even racist" behavior in her office across *the prior two years*." DE 13-5, 2013 Letter, Page ID 220 (emphasis added). And after FCA representatives indicated that they would not take action regarding the Christmas-light monkey, on April 8, 2013, Davis sent one of the representatives an e-mail stating that she took the matter "very seriously," as "monkeys have been used to depict [African Americans] historically in derogatory terms." DE 14-27, Davis E-mail, Page ID 952. Due to her earlier experience in Studio 1 with monkeys and racially offensive comments, Davis was sensitive to monkey displays and references and had let her co-workers and supervisors know as much. CA6 R. 23, Appellant Br., at 15. But Davis did not file an EEOC complaint of discrimination until March 2015—fifteen months after the close of her bankruptcy estate—even though she had enough information by December 2013 to know that she had a possible claim for racial discrimination against FCA.

On appeal, Davis argues that the district court should not have applied judicial estoppel because "[b]efore the discharge there was one monkey that appeared in March" and "[t]he first time [Davis] noticed the presence of other monkeys was *after* the [d]ischarge." CA6 R. 23, Appellant Br.,

at 26. She therefore claims that she did not know of a potential hostile work environment claim by December 10, 2013. But, as outlined, Davis's own claims in this case contradict this argument and show that she was aware of a potential claim while her bankruptcy was ongoing. Moreover, the record indicates that many of the additional incidents Davis cites as having happened after December 10, 2013, actually occurred before that date, while her bankruptcy was still pending.

For example, in her brief, Davis claims that her co-worker Michelle Menendez "brought a sock monkey to the workplace and hung it in her cubicle" 15 days after Davis's bankruptcy discharge. CA6 R. 23, Appellant Br., at 17. But in her deposition, Davis was questioned about a journal entry dated May 20, 2013, in which she had written "monkey not in 'site' [sic]. Michelle out," and Davis acknowledged that she must have been referring to Michelle's monkey.[4] DE 13- 2, Davis Dep., Page ID 145–46. Similarly, Davis's brief claims that her co-worker Joseph Marcum gave her a clay mold with the word monkey on it after her bankruptcy closed. But in her deposition, she acknowledged a journal entry stating "Joe gave me a monkey mold" under the date December 2, 2013. Id. at 146. Davis's brief also alleges that her co-worker Tom Cuadrio brought a blow-up monkey and another monkey to display on his laptop to FCA, though she claims it is "unclear" when these monkeys appeared. But the only evidence in the record about the date of the blow-up

[4] The actual journal entries are not in the record; there is only Davis's deposition testimony in which she acknowledges them when questioned.

monkey's appearance indicates that it was in the office as early as October 1, 2013. Therefore, these additional incidents actually support the application of judicial estoppel here. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002) (noting that hostile work environment claims "involve[] repeated conduct").

In short, the record and Davis's own allegations show there was ample information prior to December 10, 2013, to trigger Davis's disclosure obligation to the bankruptcy court, meaning that by her failure to do so she "assumed a position that was contrary to the one that she asserted under oath in the bankruptcy proceedings." *White*, 617 F.3d at 478.

2.

These same considerations demonstrate that any omission by Davis was not the result of "mistake or inadvertence." *Id.* In determining whether an omission was the result of mistake or inadvertence, we consider a litigant's "knowledge of the factual basis of the undisclosed claims," any "motive for concealment," and if "the evidence indicates an absence of bad faith"—with particular focus on any attempt "to advise the bankruptcy court of [an] omitted claim." *Id.*; *see Browning*, 283 F.3d at 776; *see also Eubanks*, 385 F.3d at 897–99. The final two prongs of this inquiry are not at issue here: there is no evidence that Davis made any disclosure about a potential claim to the bankruptcy court, White, 617 F.3d at 478, and if a claim existed, there would be a motive to conceal this asset, *see Lewis*, 141 F. App'x at 426 ("It is always in a Chapter 13 petitioner's

interest to minimize income and assets."); *see also White*, 617 F.3d at 479.

This leaves only Davis's "knowledge of the factual basis of the undisclosed claim." *White*, 617 F.3d at 478. This inquiry overlaps with our consideration of her assumption of a contrary position, *supra*. To summarize briefly, Davis had a demonstrated sensitivity regarding monkeys based on her experience at Studio 1, had made a written complaint to FCA's diversity office about monkey displays in Studio 7/8, and felt concerned enough about these and other incidents to document them as journal entries. After her written complaint to FCA but before her bankruptcy estate closed on December 10, 2013, there were additional monkeys displayed in Studio 7/8 that Davis now forwards as the basis of her hostile work environment claim. Still, Davis made no further written complaints to FCA during this time period and waited until fifteen months after her bankruptcy estate closed to file an EEOC complaint and initiate this lawsuit.

These actions show Davis had knowledge of the factual basis of a potential hostile work environment claim before December 10, 2013, and therefore any omission to the bankruptcy court was not the result of mistake or inadvertence.

IV.

Because Davis assumed a position that was contrary to the one that she asserted under oath in the bankruptcy proceedings, the bankruptcy court adopted this contrary position, and her omission did not result from mistake or inadvertence, the district court's decision to apply judicial estoppel was

appropriate here. *See White*, 617 F.3d at 478. We therefore do not consider the district court's alternative holding that that Davis has not shown a genuine issue of material fact regarding her ability to succeed in her Title VII and ELCRA claims and affirm the district court's grant of summary judgment for FCA based on judicial estoppel.

**Valarie DAVIS, Plaintiff,**

**v.**

**FCA US LLC a/k/a Fiat Chrysler Automobile US LLC, Defendant.**

Case No. 15-13773

Signed 08/22/2017

**Attorneys and Law Firms**

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Terry W. Bonnette, Nemeth Law, Detroit, MI, for Defendant.

## ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

GEORGE CARAM STEEH, UNITED STATES DISTRICT JUDGE

Plaintiff Valarie Davis alleges two hostile work environment claims against her employer, Fiat Chrysler Automobile US LLC. Count I alleges a violation of Title VII of the Civil Rights Act of 1964. Count II alleges a violation of Michigan's Elliott-Larsen Civil Rights Act (ELCRA). The matter is presently before the Court on defendant's motion for summary judgment. Oral argument was held on April 25, 2017. For the reasons stated below,

defendant's motion for summary judgment is GRANTED.

## I. Background

### A. Alleged Discrimination

Plaintiff, an African American woman, is a clay modeler (sculptor) who has worked for defendant since March 27, 2000. (Doc. 1 at PageID 2). Plaintiff alleges that she was "treated different[ly] from similarly situated white employees" and subject to "horrific discriminatory conduct" from her co-workers and managers. (*Id.*). Plaintiff states that this discrimination began around 2001 while she was working in Studio 1. (Doc. 13-3 at PageID 174).

On April 27, 2004, plaintiff submitted a letter to Ms. Gibbs, her EEOC representative, detailing various actions by co-workers and management that she considered "blatant racial discrimination" that may be "violations" of "federal law[s]" and her "civil rights". (Doc. 13-3 at PageID 178). Plaintiff's co-workers referred to her as "chicky monkey" and their "little brown friend." (Doc. 1 at PageID 3; Doc. 13-3 at PageID 175). They commented that plaintiff, a Detroit resident, "live[d] in the ghetto." (Doc. 13-3 at PageID 176). While plaintiff was pregnant, they asked her if she "had chocolate milk in her breast." (Doc. 1 at PageID 3; Doc. 13-3 at PageID 175). Another co-worker used a "monkey calling device" that produced a "whistle sound ... designed to attract monkeys" whenever she walked by. (Doc. 1 at PageID 2; Doc. 13-3 at PageID 175). Plaintiff's

supervisor ridiculed her for wearing a Roots sweatshirt in an apparent reference to the television miniseries, *Roots*, which recounts the history of an African man sold into slavery in America, and his descendants. (Doc. 13-3 at PageID 175). They referred to other African American employees as "Colored" and "made remarks about their kinky hair." (Doc. 13-3 at PageID 175). Plaintiff states that she apprised management and human resources of many of these acts. (Doc. 1 at PageID 3). Plaintiff also contacted her union steward on several occasions, submitting complaints and paperwork to aid an investigation. (Doc. 13-3 at PageID 176). Dissatisfied with their response, plaintiff met with another union representative in April 2004, "who strongly recommended that [she] take [her] issues to" defendant's "EEOC representative." (Doc. 13-3 at PageID 176).

Following her April 27, 2004 complaint, plaintiff asserts that she did not experience any further discrimination while working in Studio 1. (Doc. 13-2 at PageID 60; Doc. 14 at PageID 381).

Plaintiff moved from Studio 1 to Studio 7/8 in 2012. (Doc. 13-2 at PageID 130). Discrimination allegedly resumed at an unspecified point following this move. Plaintiff filed a complaint with defendant's Diversity Office on March 25, 2013, stating that throughout the past two years, she had experienced several actions that she found "unprofessional, ignorant ... and even racist." (Doc. 13-5 at PageID 219-21). These acts included unspecified comments from co-workers and "a monkey hanging from a cubical with Christmas

lights wrapped around its neck." (Doc. 13-5 at PageID 220). Defendant responded by conducting a walk-through of Studio 7/8. (Doc. 13-6 at PageID 222). Kymberly Kinchen, Keith Worthy, and Lisa Hornung observed a monkey hanging from a cubicle by its arms with Christmas lights wrapped around its waist. (*Id.*). They noted a second monkey sitting on top of an overhead cabinet at the opposite end of the studio and concluded that "neither monkey[ ] appeared to be racially offensive in any way." (*Id.*). Following this inspection, on April 8, 2013, Kinchen and Worthy met with plaintiff to discuss her concerns. (*Id.*). Plaintiff emailed Kinchen that evening to report that both monkeys were still displayed in Studio 7/8 and that she took this "very seriously" given that "monkeys have" historically "been used to depict" African Americans "in derogatory terms." (Doc. 14-27 at PageID 952).

Plaintiff asserts that her co-workers displayed eight to ten monkeys in Studio 7/8 between 2013 and January 2015. (Doc. 1 at PageID 3). The monkeys appeared in various forms including photographs within a calendar, stuffed and inflatable animals, a ceramic mold, and a Valentine's Day card given to plaintiff that depicted a monkey. (Doc. 1 at PageID 4). Plaintiff also alleges that her co-workers taunted her by repeating Johnny Cochran's statement; "if it does not fit, you must acquit." (*Id.*). Plaintiff complained to management and/or human resources about the monkeys on or about March 25, 2013, February 10, 2014, and February 13, 2015. (*Id.*). She also "repeatedly" informed her co-workers that the monkeys offended her and were "racially

insensitive." (*Id.*). Plaintiff filed a charge of discrimination with the EEOC on March 10, 2015. (Doc. 13-10 at PageID 276). She received notice of the EECO's decision to close its file on her charge as well as her suit rights on August 20, 2015. (Doc. 13-11 at PageID 277). Plaintiff filed this lawsuit on October 26, 2015. (Doc. 1 at PageID 7).

**B. Plaintiff's Bankruptcy**

Plaintiff filed a Chapter 13 bankruptcy petition on April 30, 2008. (Doc. 13-12 at PageID 281-93). Her Chapter 13 bankruptcy plan was confirmed on October 3, 2008. (Doc. 13-14 at PageID 308-09). The plan was modified for the last time on July 25, 2013. (Doc. 13-15 at PageID 310-11). The Bankruptcy Court for the Eastern District of Michigan issued an order discharging plaintiff after the completion of her Chapter 13 plan on December 10, 2013. (Doc. 13-16 at PageID 312-13).

## II. Legal Standard

Rule 56(c) empowers a court to render summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (en banc) (citing Fed. R. Civ. P. 56(c)).

The standard for determining whether summary judgment is appropriate is " 'whether the

evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' " *Amway Distrib. Benefits Ass'n v. Northfield Ins. Co.*, 323 F.3d 386, 390 (6th Cir. 2003) (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). The evidence and all reasonable inferences must be construed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Redding v. St. Eward*, 241 F.3d 530, 532 (6th Cir. 2001). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson*, 477 U.S. at 247-48 (emphasis in original); *see also Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 907 (6th Cir. 2001).

If the movant establishes by use of the material specified in Rule 56(c) that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law, the opposing party must come forward with "specific facts showing that there is a genuine issue for trial." *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 270 (1968); *see also McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). Mere allegations or denials in the non-movant's pleadings will not meet this burden, nor will a mere scintilla of evidence supporting the non-moving party. *Anderson*, 477 U.S. at 248, 252. There must instead be evidence from which a jury could reasonably find for the non-

movant. *McLean*, 224 F.3d at 800 (citing *Anderson*, 477 U.S. at 252).

## III. Analysis

### A. Estoppel

Defendant argues that judicial estoppel precludes plaintiff from bringing her hostile work environment claims. Plaintiff responds that judicial estoppel does not apply because she obtained this cause of action more than seven years after she filed for bankruptcy.

"Th[e] doctrine [of judicial estoppel] is utilized in order to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship." *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 476 (6th Cir. 2010) (internal citations omitted). "Judicial estoppel, however, should be applied with caution to avoid impinging on the truth-seeking function of the court, because the doctrine precludes a contradictory position without examining the truth of either statement." *Eubanks v. CBSK Fin. Grp., Inc.*, 385 F.3d 894, 897 (6th Cir. 2004) (internal citations omitted).

[T]o support a finding of judicial estoppel, [the Court] must find that: (1) [plaintiff] assumed a position that was contrary to the one that she asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) [plaintiff's] omission did not result from mistake or inadvertence. In

determining whether [plaintiff's] conduct resulted from mistake or inadvertence, this court considers whether: (1) she lacked knowledge of the factual basis of the undisclosed claims; (2) she had a motive for concealment; and (3) the evidence indicates an absence of bad faith. In determining whether there was an absence of bad faith, we will look, in particular, at [plaintiff's] "attempts" to advise the bankruptcy court of her omitted claim.

*White*, 617 F.3d at 478.

**1. Plaintiff Assumed a Position that Was Contrary to the One She Asserted Under Oath in the Bankruptcy Proceedings.**

"[T]o support a finding of judicial estoppel, [the Court] must find that: (1) [plaintiff] assumed a position that was contrary to the one that she asserted under oath in the bankruptcy proceedings." *White*, 617 F.3d at 478. "[I]t is well-established that at a minimum, 'a party's later position must be "clearly inconsistent" with its earlier position[ ]' for judicial estoppel to apply." *Lorillard Tobacco Co. v. Chester, Willcox & Saxbe, LLP*, 546 F.3d 752, 757 (6th Cir. 2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)).

Plaintiff's position in this case is clearly inconsistent with the position that she asserted under oath in the bankruptcy proceedings. In her complaint, plaintiff asserts claims under Title VII and the ELCRA, and asks the Court to "award judgment against defendant" for the "economic and

non-economic damages" she sustained. (Doc. 1 at PageID 7). It is undisputed that plaintiff did not list this cause of action when she filed for bankruptcy on April 30, 2008, and did not amend this position while the bankruptcy was pending. (Doc. 13-12 at PageID 292).

Plaintiff's failure to disclose her claims was contrary to the bankruptcy code. A debtor filing under Chapter 13 must file "a schedule of assets and liabilities." 11 U.S.C. § 521(1). A cause of action is an asset that must be scheduled under § 521(1). *Eubanks*, 385 F.3d at 897. Debtors are also "required to disclose all potential causes of action." *Lewis v. Weyerhaeuser*, 141 Fed.Appx. 420, 424 (6th Cir. 2005) (quoting *In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999)). "The debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information ... prior to confirmation to suggest that it may have a possible cause of action, then that it is a 'known' cause of action such that it must be disclosed." *In re Coastal Plains, Inc.*, 179 F.3d at 208 (quoting *Youngblood Grp. v. Lufkin Federal Savings and Loan Ass'n*, 932 F. Supp. 859, 867 (E.D. Tex. 1996)). "Any claim with potential must be disclosed, even if it is 'contingent, dependent, or conditional.' " *Id.* This "duty of disclosure is a continuing one." *Lewis*, 141 Fed.Appx. at 424 (internal quotations and citations omitted).

Despite her duty to disclose, plaintiff never listed this cause of action. As such, plaintiff now assumes a position contrary to the one she asserted under oath in her bankruptcy proceeding.

**2. The Bankruptcy Court Adopted the Contrary Position.**

"[T]o support a finding of judicial estoppel, [the Court] must find that:... (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition." *White*, 617 F.3d at 478. It is undisputed that plaintiff did not list these claims in her schedule of assets and liabilities, and that plaintiff never amended this position while her bankruptcy was pending. It is also undisputed that the bankruptcy court issued plaintiff's discharge order on December 10, 2013. (Doc. 13-16 at PageID 312-13). The undisputed facts, therefore, indicate that the bankruptcy court adopted plaintiff's contrary position.

**3. Plaintiff's Omission Did Not Result from Mistake or Inadvertence.**

"[T]o support a finding of judicial estoppel, [the Court] must find that: ... (3) [plaintiff's] omission did not result from mistake or inadvertence." *White*, 617 F.3d at 478. "In determining whether [plaintiff's] conduct resulted from mistake or inadvertence, this court considers whether: (1) she lacked knowledge of the factual basis of the undisclosed claims; (2) she had a motive for concealment; and (3) the evidence indicates an absence of bad faith." *Id.*

**a. Plaintiff Did Not Lack Knowledge of the Factual Basis of the Undisclosed Claims.**

Plaintiff alleges a hostile work environment based on discrimination that allegedly occurred between 2001 and 2015. Most of the allegations in her complaint, (Doc. 1 at PageID 2-4), are reflected in two pieces of evidence; plaintiff's April 27, 2004 letter to her EEOC representative, (Doc. 13-3 at PageID 174-78), and her March 25, 2013 letter to defendant's diversity office, (Doc. 13-5 at 219-21). If a single act contributing to a Title VII hostile environment claim occurs within the filing period outlined by 42 U.S.C. § 2000e-5, then "the entire time period of the hostile environment claim may be considered by a court for the purposes of determining liability." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002). "It does not matter that some of the component acts fall outside the statutory time period." *Id.* Count I, therefore, encompasses all of these allegations. But, due to the ELCRA's three year period of limitations, Count II is based solely on acts occurring between 2012 and 2015. Acts committed prior to 2012, including all of the allegations included in plaintiff's April 27, 2004 complaint, may serve as background evidence to contextualize the ELCRA claim.

When plaintiff filed for bankruptcy on April 30, 2008, she had knowledge of all of the discrimination that she experienced and directly observed between 2001 and 2004. These acts include various comments from co-workers and managers regarding a monkey, brown skin, kinky hair, and ghettos, as well as the use of a "monkey calling device." (Doc. 13-3 at PageID 174-78). In addition to her knowledge of these facts, plaintiff knew that the acts offended her. She described them as "blatant

racial discrimination" that may be "violations" of "federal law[s]" and her "civil rights." (Doc. 13-3 at PageID 175). Plaintiff also knew that she had complained about these acts. She reported them to management and human resources. (Doc. 1 at PageID 3). She contacted her union steward to submit multiple complaints and paperwork to aid their investigation. (Doc. 13-3 at PageID 176). She also met with an additional union representative "who strongly recommended that [she] take [her] issues to" defendant's "EEOC representative." (Doc. 13-3 at PageID 176).

Plaintiff asserts that she did not have a potential Title VII or ELCRA claim against defendant on April 30, 2008 because she had never filed an EEOC charge regarding the discrimination alleged in her April 27, 2004 complaint and, in 2008, was time barred from doing so. (Doc. 13-3 at PageID 174-78). But plaintiff's circumstances changed. She asserts that racial discrimination resumed around 2012. (Doc. 13-5 at PageID 220) (alleging discrimination "during the last 2 years and even now [March 25, 2013]."") During this time, while her bankruptcy was still pending, plaintiff gained more knowledge of the factual basis of Counts I and II. On March 25, 2013, plaintiff complained about a monkey wrapped in Christmas lights in Studio 7/8. (Doc. 13-5 at PageID 220). She complained about this and a second monkey on April 8, 2013. (Doc. 14-26 at PageID 950). Plaintiff also knew that these acts offended her and that she had complained about them. In April 2013, she met with defendant's diversity representatives and stated that she took these acts "very seriously" given that "monkeys

have" historically "been used to depict" African Americans "in derogatory terms." (Doc. 14-27 at PageID 952). The Court, therefore, finds that plaintiff had knowledge of the factual basis of the undisclosed claims by April 2013 such that the omission of these claims did not result from mistake or inadvertence.

**b. Plaintiff Had a Motive to Conceal her Claims.**

Debtors petitioning for bankruptcy protection always have a motive to conceal undisclosed claims; "wanting to keep any settlement or judgment to himself." *Stephenson v. Malloy*, 700 F.3d 265, 274 (6th Cir. 2012). *See also Lewis*, 141 Fed.Appx. at 426 ("It is always in a Chapter 13 petitioner's interest to minimize income and assets."). If a claim is disclosed, it will "[become] a part of the bankruptcy estate, then the proceeds from it could go towards paying [the debtor's] creditors, rather than simply to paying [the debtor]." *White*, at 479.

Plaintiff concealed the existence of her claims. It is undisputed that she did not list this cause of action when filing for bankruptcy on April 30, 2008, and did not amend this position while the bankruptcy was pending. (Doc. 13-12 at PageID 292). Concealing the claims allowed them to be exempted from plaintiff's bankruptcy estate. If exempted, plaintiff would be likely to "keep any settlement or judgment to [herself]." *Stephenson*, 700 F.3d at 274. The Court, therefore, finds that plaintiff had a motive to conceal her claims.

**c. The Evidence Does Not Indicate an Absence of Bad Faith.**

The "absence of bad faith inquiry focuses on affirmative actions taken by the debtor to notify the trustee or bankruptcy court of an omitted claim." *Kimberlin v. Dollar Gen. Corp.*, 520 Fed.Appx. 312, 315 (6th Cir. 2013). It is undisputed that plaintiff did not list these claims in her original schedule of assets. (Doc. 13-12 at PageID 292). Further, despite her continuing duty to disclose assets including a potential cause of action, plaintiff never amended the schedule to list the claims while her bankruptcy was pending. The evidence before the Court, therefore, does not indicate an absence of bad faith.

**4. Plaintiff's Arguments Are Not Dispositive.**

Plaintiff argues that she did not fail to disclose a pre-petition claim because, due to her failure to file an EEOC charge around 2004 and the ELCRA's limitation period, she did not have a cause of action on April 20, 2008. Plaintiff instead asserts that her claims arose post-petition. But Chapter 13 debtors have a continuing obligation to disclose all potential claims, *Lewis*, 141 Fed.Appx. at 424, including potential claims that arise post-petition while the bankruptcy is pending. *See Kimberlin*, 520 Fed.Appx. at 315 (finding that plaintiff should have notified the court of her potential post-petition claim that arose only 41 days before her final bankruptcy payment was scheduled so that the Court could have "modified her Chapter 13 plan to grant creditors some percentage of any future recovery."); *Scisney v.*

*Gen. Elec. Co.*, No. 4:14-cv-00008, 2015 WL 7758542, at *5 (W.D. Ky. Dec. 1, 2015) (applying judicial estoppel where the plaintiff, a Chapter 13 debtor, experienced discrimination both pre-petition and post-petition, "knew of the factual basis for potential claims post-petition but pre-discharge," and "failed to disclose any of them at any time.") *See also In re Flugence*, 738 F.3d 126, 129 (5th Cir. 2013) ("Chapter 13 debtors have a continuing obligation to disclose post-petition causes of action."). Thus, even if plaintiff's claims are viewed as post-petition, the allegations occurring between 2012 and April 2013 triggered her duty to disclose. These allegations constitute a potential claim because, even if plaintiff did "not know all the facts or even the legal basis for the cause of action" by April 2013, these acts provided "enough information ... prior to confirmation to suggest that [plaintiff] may have a possible cause of action" which is considered "a 'known' cause of action such that is must be disclosed." *In re Coastal Plains, Inc.*, 179 F.3d at 208 (quoting *Youngblood Grp.* 932 F. Supp. at 867). Further, plaintiff's bankruptcy was still pending in April 2013 when this potential claim arose. *See* (Doc. 13-16 at PageID 312-13). Therefore, even if this cause of action arose post-petition, plaintiff was required to disclose these claims.

**B. Hostile Work Environment**

Hostile work environment claims involve repeated conduct. *Morgan*, 536 U.S. at 115. These claims "offer[ ] employees protection from a 'workplace[ ] permeated with discriminatory intimidation, ridicule, and insult that is sufficiently

severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment....' " *Barrett v. Whirlpool Corp.,* 556 F.3d 502, 514 (6th Cir. 2009) (quoting *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21 (1993)) (alteration in original). "To prove that [s]he was subject to a hostile work environment in violation of Title VII, plaintiff must prove: (1) [s]he belongs to a protected group; (2) [s]he was subject to unwelcome harassment; (3) the harassment was based on race; (4) the harassment affected a term, condition, or privilege of employment and (5) defendant knew or should have known about the harassment and failed to take action." *Moore v. KUKA Welding Sys. & Robot Corp.,* 171 F.3d 1073, 1078–79 (6th Cir. 1999). The elements of a hostile work environment under the ELCRA "are substantially the same." *Curry v. SBC Commc'ns, Inc.*, 669 F. Supp. 2d 805, 833 (E.D. Mich. 2009) (citing *Quinto v. Cross & Peters Co.,* 451 Mich. 358, 368-69 (1996)).

The Court finds that the first two elements are satisfied here, as plaintiff, an African American, repeatedly complained of the alleged discrimination. The comments allegedly made to plaintiff between 2001 and 2004 constitute harassment based on race. It is less clear whether the presence of numerous monkeys in Studio 7/8 also constitute harassment based on race. Defendant argues that a few monkeys were placed in Studio 7/8 prior to plaintiff joining that office. Moreover, they argue that all of the monkeys were "sentimental mementos," (Doc. 13 at PageID 105), as opposed to racial harassment. Plaintiff disagrees, asserting that monkeys have historically been used to depict African Americans in

derogatory terms. The Court, however, finds that even if the monkeys constitute racial harassment, plaintiff's claim fails because the race-based harassment was not sufficiently severe or pervasive.

The Court must "consider whether the totality of [the] race-based harassment was 'sufficiently severe or pervasive to alter the conditions of [plaintiff's] employment and create an abusive working environment.' " *Williams v. CSX Transp. Co.*, 643 F.3d 502, 512 (6th Cir. 2011) (quoting Harris, 510 U.S. at 21). The harassment must be severe or pervasive in two aspects. *Curry*, 669 F. Supp. 2d at 833. "Both an objective and subjective test must be met; in other words, the conduct must be so severe or pervasive as to constitute a hostile or abusive working environment both to the reasonable person and the actual victim." *Randolph v. Ohio Dep't of Youth Servs.,* 453 F.3d 724, 733 (6th Cir. 2006). "Factors to consider include 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " *Williams*, 643 F.3d at 512 (citing *Harris*, 510 U.S. at 23).

The alleged racist statements made between 2001 and 2004 "are certainly insensitive, ignorant, and bigoted." *Id.* at 513. The display of numerous stuffed monkeys is also insensitive. But, even when considered in their totality, this harassment is not sufficiently severe or pervasive. The Sixth Circuit "has established a relatively high bar for what amounts to actionable discriminatory conduct under

a hostile work environment theory." *Phillips v. UAW Int'l*, 854 F.3d 323, 328 (6th Cir. 2017) (citing *Williams*, 643 F.3d at 506, 513) (finding no hostile work environment where defendant "call[ed] Jesse Jackson and Al Sharpton 'monkeys' and [said] that black people should 'go back to where [they] came from' " among other racist comments); *Reed v. Procter & Gamble Mfg. Co.*, 556 Fed.Appx. 421, 432 (6th Cir. 2014) (no hostile work environment where plaintiff was subjected to race-based comments and his supervisor stood behind him and made a noose out of a telephone cord); *Clay v. United Parcel Service, Inc.*, 501 F.3d 695, 707–08 (fifteen racially-motivated comments and instances of disparate treatment over a two-year period were isolated, not pervasive, and therefore not actionable under Title VII). "The misconduct alleged here ... does not clear that bar." *Phillips*, 854 F.3d at 328. As in *Williams*, the alleged statements "more closely resemble 'a mere offensive utterance' than conduct that is 'physically threatening or humiliating.' " *Williams*, 643 F.3d at 513. Further, the statements are isolated from the monkey displays by both time and space. The former occurred in Studio 1 between 2001 and 2004. The latter occurred in Studio 7/8, a different office, between 2013 and 2015. Finally, there is no evidence that the harassment unreasonably interfered with plaintiff's work performance. She has worked for defendant since 2000 without any leaves, absences, or unsuccessful performance that she attributes to the alleged harassment. As such, defendant is entitled to judgment as a matter of law.

## IV. Conclusion

Plaintiff does not cite to evidence that creates a genuine issue of material fact as to whether she assumed a position contrary to the one she asserted in her bankruptcy proceeding, whether the bankruptcy court adopted the contrary position as part of a final deposition, or whether her omission resulted from mistake or inadvertence. Moreover, plaintiff has not provided a genuine issue of material fact regarding the severity and pervasiveness of her hostile work environment claims. Therefore, for the reasons stated above, the Court finds that defendant is entitled to summary judgement on the basis of judicial estoppel.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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VALARIE DAVIS,

Plaintiff-Appellant,

v.

FIAT CHRYSLER AUTOMOBILES U.S., LLC,

Defendant-Appellee.

ORDER

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FILED Oct 11, 2018

DEBORAH S. HUNT, Clerk

BEFORE: GIBBONS, BUSH, and LARSEN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk