STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH MAUER,

Plaintiff-Appellant,

v

LORI J. GIDLEY, JAMES SCHIEBNER, DEPARTMENT OF CORRECTIONS, and KATHY WARNER,

Defendants-Appellees,

and

MICHIGAN CORRECTIONS ORGANIZATION SEIU LOCAL 526M,

Defendant.

JOSEPH MAUER,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS, JAMES SCHIEBNER, LORI J. GIDLEY, and KATHY WARNER,

Defendants-Appellees,

and

CIVIL SERVICE COMMISSION,

Defendant.

Before: SAAD, P.J., and CAVANAGH and CAMERON, JJ.

PER CURIAM.

UNPUBLISHED October 17, 2017

No. 333230 Ingham Circuit Court LC No. 15-000341-CD

No. 333874 Court of Claims LC No. 15-000105-MK These consolidated cases arise from the decision of the Michigan Department of Corrections (MDOC) to terminate plaintiff's employment for accessing or searching for pornography on his computer at work. In Docket No. 333230, plaintiff appeals an order issued by the Ingham Circuit Court that granted defendants' motion for summary disposition against plaintiff's disability claim under the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.*, and an order that granted defendants' motion to dismiss plaintiff's federal due process claim. In Docket No. 333874, plaintiff appeals the order issued by the Court of Claims which granted defendants' motion for summary disposition on plaintiff's state due process and defamation claims. For the reasons provided below, we affirm.

I. FACTUAL BACKGROUND

Plaintiff testified that he began working as a corrections officer at the Oaks Correctional Facility in 2001. Plaintiff was in a car accident in 2002, suffered several broken bones, and required numerous surgeries. Plaintiff returned to work with "some light duty restrictions" until he was off of crutches. Plaintiff testified that the doctor told him he could not work as a mechanic anymore, which he did before the accident, because of the "heavy lifting and bending over."

Plaintiff stated that he began having back problems again in 2013 and learned that he had two fractured vertebrae in his lower back related to the 2002 car accident. Notably, after treatment, which included physical therapy and shots, plaintiff's doctor did not place any work restrictions on plaintiff. Plaintiff's coworkers helped by "doing some of the heavy lifting and carrying prisoners' property around or pushing food carts in." Plaintiff also worked in "the bubble," which he described as a "control center" to observe the unit. Plaintiff and his coworkers traded work informally when plaintiff's back was sore. Sometimes, if his supervisors asked him to work overtime, plaintiff asked for lighter duty, a request the supervisors usually—but did not always—accommodated.

A. PRE-TERMINATION PROCEDURE

In a memorandum prepared in January 2014, Lieutenant T. Holden heard a baseball game streaming on plaintiff's computer. Holden looked at the recent Internet history, which showed several sports and radio websites and a website called "570 Photos of Beauty Queen Liz Opie relaxing on Beach in Bikini." MDOC Inspector James Schiebner requested the last 30 days of plaintiff's Internet history, which returned 35,051 hits on 5,279 websites, including searches for adult websites.

Schiebner provided plaintiff with formal notice of an investigation into plaintiff's computer usage, including searches for pornography at work, and a questionnaire about the findings. Plaintiff responded that he accessed some identified websites, but he denied accessing or attempting to access any of the listed pornography websites. Schiebner concluded that plaintiff's accessing or attempting to access inappropriate websites violated work rules. After the Internal Affairs Division found sufficient evidence of the listed violations, MDOC provided plaintiff with notice of charges and a scheduled disciplinary conference.

A summary of the disciplinary conference reflects that plaintiff admitted that he used his work computer to access the Internet and denied that he visited adult websites at work. Chris Schmidt, a representative from the Michigan Corrections Organization (MCO) union, suggested that another officer accessed an adult website on plaintiff's computer as a joke from 12:55 p.m. to 12:57 p.m. on February 1, 2014, though Schmidt admitted that he could produce no proof to support that statement. Plaintiff testified that he specified this time period because he was doing rounds then. MDOC Warden Lori Gidley noted that the documentation showed that plaintiff was on the Internet "most of his shift" and that his web surfing continued, even after being put on notice that his Internet usage was being reviewed. Gidley upheld the charges of work rules violations and forwarded her decision to MDOC Disciplinary Coordinator Kathy Warner in the central office for a final decision.

After the conference, Gidley, Schiebner, Warner, and Human Resources representative Sheila Spencley had e-mail conversations about the adult-content websites plaintiff searched for, whether he actually accessed them, and whether plaintiff was at work when those Internet searches occurred. At Gidley's request, Spencley pulled timecards to compare plaintiff's attendance and Internet history and found that some of the pornography searches occurred on a later shift than when plaintiff was working. Warner asked Schiebner to verify this information before she made a final decision. Schiebner reviewed plaintiff's schedule and Internet history, which yielded nine shifts when plaintiff was not working, eight of which coincided with software updates but no web history. Internet searches occurred during the ninth identified shift when plaintiff was not working, but none of them reflected "adult or pornographic web surfing." Warner ultimately concluded that plaintiff should be discharged.

B. POST-TERMINATION PROCEDURE

The day after plaintiff's termination, the MCO filed a grievance on plaintiff's behalf, which was denied. MDOC's labor relations manager affirmed the denial of the grievance and noted that plaintiff used his work computer while on duty to search for inappropriate websites, including pornography, and "spent a significant portion of time at work accessing the websites." The labor relations manager further recognized that plaintiff continued to surf the Internet and sent explicit material via his work e-mail while he knew he was under investigation. According to the labor relations manager, this behavior showed that plaintiff's claim that he was not responsible was not credible. The MCO grievance committee voted not to send the grievance to arbitrator." Plaintiff appealed this decision and maintained that someone else used his login to access the Internet, but the Executive Board declined to refer the grievance to arbitration and closed the grievance.

C. DOCKET NO. 333230-CIRCUIT COURT ACTION

Plaintiff filed a complaint in the Ingham Circuit Court and named MDOC, the MCO, Schiebner, and Gidley as defendants. Plaintiff agreed to dismiss his fair representation complaint against defendant MCO. Over plaintiff's opposition, the circuit court granted defendants MDOC, Gidley, and Schiebner's motion for partial summary disposition of plaintiff's disability discrimination claim under MCR 2.116(C)(4) and (8), and it dismissed the federal due process claim brought in count three for all defendants because they had qualified immunity.

Plaintiff subsequently brought an unfair labor practice charge in the Civil Service Commission (CSC) against MDOC and the MCO. The Civil Service Hearings Office denied plaintiff's charge against MDOC and explained that the Civil Service Hearings Office does not have the authority to decide whether MDOC violated the collective bargaining agreement (CBA) when it terminated plaintiff's employment.

Regarding plaintiff's claim against the MCO, the CSC requested a written explanation for plaintiff's late filing of the charge, which was more than six weeks after the challenged action. Plaintiff responded that no one informed him of the deadline and cited his work hours at a demanding job and his wife's health as reasons for the late filing. The Civil Service Hearings Office rejected plaintiff's reasons and summarily dismissed the charge. Plaintiff appealed this decision to the Employment Relations Board, and the CSC issued a final decision approving of the board's decision. The CSC's final decision contains a notice about appealing the decision to the circuit court within 60 days by naming the CSC as an appellee.

Plaintiff filed a motion in the circuit court to amend his complaint to join CSC to the original claims and to add Warner as a defendant to plaintiff's disability discrimination claim. Plaintiff subsequently filed a notice of withdrawal of his motion to add CSC, but he provided no explanation for this withdrawal. With the circuit court's permission, plaintiff filed an amended complaint adding Warner as a defendant to the PWDCRA claim. Defendants filed a motion for summary disposition under MCR 2.116(C)(10) on plaintiff's disability discrimination claim. The circuit court granted the motion over plaintiff's opposition because defendants did not regard plaintiff as being disabled.

D. DOCKET NO. 333874—COURT OF CLAIMS ACTION

Plaintiff simultaneously filed a complaint in the Court of Claims on April 29, 2015, in which he initially named MDOC, Schiebner, and Gidley as defendants. The Court of Claims granted in part defendants' motion to dismiss the complaint. The Court of Claims dismissed plaintiff's claim that defendants violated the CBA on the basis of plaintiff's stipulation to dismiss that count. The Court of Claims dismissed plaintiff's claim that defendants violated the Michigan Constitution with respect to the individual defendants, Schiebner and Gidley, while permitting it to go forward against MDOC. The trial court also allowed plaintiff's defamation claim against Schiebner and Gidley to proceed.

With the Court of Claims' permission, plaintiff filed an amended complaint, which added Warner and the CSC as defendants. The Court of Claims granted defendants' motions for summary disposition on plaintiff's claim against the CSC based on the fact that it lacked subject-matter jurisdiction over plaintiff's claim against the CSC brought in count one. Plaintiff does not challenge on appeal any claim in relation to the CSC or the MCO.

II. ANALYSIS

In each docket, plaintiff appeals the trial court's decision to grant defendants' motion for summary disposition. We review a trial court's decision on a motion for summary disposition de novo. *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 25; 703 NW2d 822 (2005).

A. DOCKET NO. 333230

1. FEDERAL DUE PROCESS

"Whether a defendant is entitled to qualified immunity is a question of law" that the Court reviews de novo. *Morden v Grand Traverse Co*, 275 Mich App 325, 340; 738 NW2d 278 (2007). Neither defendants nor the trial court specified the rule governing dismissal, but the trial court's reliance on qualified immunity aligns with summary disposition under MCR 2.116(C)(7), which provides for "dismissal of the action . . . because of . . . immunity granted by law." When this Court reviews a grant of summary disposition under section (C)(7) for qualified immunity, it must accept as true the complaint allegations unless the documentary submissions contradict them. *By Lo Oil Co*, 267 Mich App at 26. "A trial court properly grants a motion for summary disposition under MCR 2.116(C)(7) when the undisputed facts establish that the moving party is entitled to immunity granted by law." *Id*.

42 USC 1983 provides for a cause of action when an individual acting under color of law deprives another of his or her constitutional rights. A defense of qualified immunity is available if the defendant did not violate a constitutional right or if that right was not clearly established at the time of defendant's challenged action. *Pearson v Callahan*, 555 US 223, 232, 236; 129 S Ct 808; 172 L Ed 2d 565 (2009). In this case, plaintiff brought a federal due process claim against defendants Schiebner and Gidley. The parties do not dispute that plaintiff had a protected interest in his state employment and that procedural due process guarantees applied to termination of that employment. Rather, the parties dispute whether defendants' termination of plaintiff's employment comported with those due process protections.

Procedural due process requires notice and an opportunity to respond to charges before termination of protected employment. *Cleveland Bd of Ed v Loudermill*, 470 US 532, 546; 105 S Ct 1487; 84 L Ed 2d 494 (1985). The United States Supreme Court explained that "the pretermination 'hearing,' though necessary, need not be elaborate." *Id.* at 545. "The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546. The Court concluded that "all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by [state] statute." *Id.* at 547-548.

Defendants complied with procedural due process protections before they terminated plaintiff. Schiebner provided plaintiff with notice of the investigation and asked plaintiff to complete a questionnaire about the work-inappropriate Internet searches. Plaintiff denied that he attempted to access the websites with adult content and explained that he may have clicked on words or phrases while reading the news but did not knowingly search for pornography. Plaintiff and a union representative attended a disciplinary conference and further responded to the charges. When plaintiff raised the possibility that the searches were conducted when he was not at his computer, Schiebner investigated that contention and concluded that the timecards showed that plaintiff was not at work during some of the shifts identified in the search history, but none of the searches for pornographic material occurred during those shifts when plaintiff was absent. Warner did not make the decision to terminate plaintiff's employment until after Schiebner verified this information.

Plaintiff argues that defendants deprived him of due process when they purportedly "buried" a second investigation that exonerated plaintiff because that second investigation returned searches for work-inappropriate websites when plaintiff was not working, which shows that the searches that occurred while he was at work must have also been conducted by someone else. We disagree.

Plaintiff overstates the significance of the second investigation for the purpose of raising a triable due process claim. First, the findings from the second investigation do not show that plaintiff was not the one who conducted the inappropriate web surfing while he was on duty. Moreover, defendants' conclusion that it could not proceed on the results of the second investigation highlights defendants' compliance with due process by showing defendants' efforts to confirm that plaintiff was on duty when the searches listed in the first report were conducted before proceeding with disciplinary action.

Plaintiff also challenges the post-termination proceedings and argues that MDOC raised new misconduct allegations after the disciplinary conference based on e-mails that plaintiff sent with pornographic material without giving plaintiff a copy of the e-mails or an opportunity to defend against them.

First, defendants did not discover these e-mails until after plaintiff's termination, so they were not and could not have been a factor in defendants' decision to terminate plaintiff's Second, the CBA governs disputes over evidence, and plaintiff originally employment. complained that the MCO failed to obtain the e-mails that Schiebner refused to give to plaintiff after his discharge. In essence, plaintiff seeks to challenge the MCO's handling of the grievance through a due process claim against defendants Schiebner and Gidley rather than through an appeal from the CSC decision. A plaintiff may not file an independent action to seek redress of claims that the employee could have challenged before the CSC. Womack-Scott v Dep't of Corrections, 246 Mich App 70, 80; 630 NW2d 650 (2001). Additionally, "the availability of state-created remedies satisfies the requirements of due process." Mollett v City of Taylor, 197 Mich App 328, 344-345; 494 NW2d 832 (1992). While plaintiff brought an untimely unfair labor practice charge before the CSC, he ultimately decided not to proceed against the CSC in circuit court. This decision does not permit him to attribute the failure to obtain these e-mails to Schiebner and Gidley when the CBA provides a procedure for obtaining documents, and an unfair labor practice charge against the MCO provides a forum for plaintiff to challenge the MCO's representation. Thus, we affirm the circuit court's grant of summary disposition because defendants Schiebner and Gidley did not violate due process protections and were entitled to qualified immunity.

2. PWDCRA

The trial court granted summary disposition against plaintiff's disability claim under MCR 2.116(C)(10). "MCR 2.116(C)(10) tests the factual support of a plaintiff's claim." *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). MCR 2.116(C)(10) permits a trial court to grant summary disposition if "there is no genuine issue as to any material fact[] and the moving party is entitled to judgment or partial judgment as a matter of law." The trial "court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence

submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial." *Spiek*, 456 Mich at 337.

To prove a violation of the PWDCRA, a plaintiff must show "(1) that he is disabled as defined in the act, (2) that "the disability is unrelated to his ability to perform his job duties, and (3) that he has been discriminated against in one of the ways delineated in the statute." *Peden v Detroit*, 470 Mich 195, 204; 680 NW2d 857 (2004) (quotation marks, citation, and brackets omitted). Pertinent to this appeal, the PWDCRA defines a "disability" as any of the following:

(*i*) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic

(A) for the purposes of article 2 [MCL 37.1201 *et seq.*] substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.

* * *

(*ii*) A history of a determinable physical or mental characteristic described in subparagraph (i).

(*iii*) Being regarded as having a determinable physical or mental characteristic described in subparagraph (*i*). [MCL 37.1103(d).]

"Major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." *Chiles v Machine Shop, Inc*, 238 Mich App 462, 477; 606 NW2d 398 (1999) (quotation marks and citation omitted). "Whether an impairment substantially limits a major life activity is determined in light of (1) the nature and severity of the impairment, (2) its duration or expected duration, and (3) its permanent or expected permanent or long-term effect." *Lown v JJ Eaton Place*, 235 Mich App 721, 728; 598 NW2d 633 (1999). The plaintiff must provide "some evidence from which a factfinder could conclude that [his] disability caused substantial limitations when compared to the average person. Nonwork major life activities are examined in light of whether the person can perform the normal activities of daily living." *Id*. at 731-732 (citation omitted).

A plaintiff must show that the employer regards the employee as "having a characteristic that substantially limit[s] a major life activity" at the time of his employment. *Michalski v Bar Levav*, 463 Mich 723, 733-734; 625 NW2d 754 (2001). This disability may be actual or perceived. *Id.* at 733. However, any impairment, whether actual or perceived, must be a "substantial limitation on [the employee's] ability to perform a wide range of jobs." *Chiles*, 238 Mich App at 482. The limitation must affect the plaintiff's ability to work generally, not simply be an inability to perform "a specific position of employment." *Id.* at 483.

Here, there is no genuine issue that plaintiff was not disabled under the statute and that defendants did not perceive plaintiff as being disabled under the statute. After the car accident in

2002, plaintiff experienced difficulty walking on unstable surfaces, such as loose gravel or snow, sitting for long car rides, and he was prohibited from heavy lifting and bending over. The trial court correctly found that plaintiff's inability to walk on loose surfaces or sit for extended periods of time did not reflect substantial limitations on major life activities. Further, despite his limitations, plaintiff returned to work in the same position he held since 2001, and his coworkers helped him by performing heavy lifting or letting him work in the "bubble." At plaintiff's request, his supervisors also reassigned him to lighter duties when his back was sore, but according to plaintiff's testimony, they could not always reassign him. These arrangements show that plaintiff's supervisors were aware that plaintiff's back injury somewhat limited his ability to function at work, but these limitations did not affect his ability to perform a wide range of jobs.¹

The record also supports the trial court's rejection of plaintiff's argument that defendants perceived him as disabled because Schiebner, Gidley, and Warner were not aware that plaintiff had a back injury. The trial court differentiated between the direct supervisors, who knew about plaintiff's back injury and resulting limitations, and "the decision-makers involved in the termination and the named Defendants in this case," who did not know about them. Defendants' unawareness of plaintiff's back injury is significant because plaintiff's disability discrimination claim depends on defendants' perception of his disability, rather than an actual disability. See *Michalski*, 463 Mich at 733-734.

Plaintiff's attempt to invoke a "cat's paw theory"² to impute his direct supervisors' knowledge to those defendants who decided to terminate his employment is misguided. Those supervisors who knew about plaintiff's injury had no influence on the termination decision. Indeed, an e-mail discussion shows that Warner made the termination decision in spite of Gidley's request that plaintiff merely be suspended for 30 days. And Spencley testified before the Division of Unemployment Appeals that plaintiff's file showed that he was off in 2006 for a back injury and returned to work with no restrictions and no disability accommodation. Although plaintiff testified that he reported the medication used to treat the back injury to management, he denied telling anyone that he needed an accommodation. Likewise, plaintiff agreed that he did not talk to Schiebner about his back, and he denied telling Schiebner that he

¹ Likewise, we also reject plaintiff's argument that defendants' refusal to assign him to disruptive inmate squads shows that defendants regarded plaintiff as disabled. Plaintiff's supervisors' refusal to assign him to manage disruptive inmates does not show that they perceived plaintiff as substantially limited in his ability to work generally. Instead, when considered in light of plaintiff's continued employment after the original back injury, it shows that the supervisors believed plaintiff was able to perform his job except for some identified duties. These arrangements show that plaintiff's supervisors did not regard him as unable to perform "a wide range of jobs."

² This theory "refers to a situation in which a biased subordinate, who lacks decision-making power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *EEOC v BCI Coca-Cola Bottling Co*, 450 F3d 476, 484 (CA 10, 2006).

thought he was being investigated because of his back problem. Plaintiff denied talking about his back problem with Gidley, whom he confirmed worked at the facility for about five months. Plaintiff also denied telling Warner that he had a back problem or that he knew her before termination of his employment.

Plaintiff's speculations about Schiebner's and Gidley's knowledge do not create a triable issue of whether defendants knew about plaintiff's back injury and improperly perceived him as disabled. Thus, we affirm the trial court's grant of summary disposition of this reason, and we do not address plaintiff's pretext argument.

B. DOCKET NO. 333874

1. STATE DUE PROCESS

Plaintiff asserted a state due process violation against defendants Schiebner, Gidley, Warner, and MDOC, which we review de novo. *York v Civil Serv Comm*, 263 Mich App 694, 699; 689 NW2d 533 (2004).

We affirm the Court of Claims' grant of summary disposition for the individually named defendants under MCR 2.116(C)(8) because plaintiff could not bring a state constitutional claim against them. A trial court properly grants summary disposition under MCR 2.116(C)(8) where the "opposing party has failed to state a claim on which relief can be granted." "A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone." Feyz v Mercy Memorial Hosp, 475 Mich 663, 672; 719 NW2d 1 (2006). Such a motion "tests whether the complaint states a claim as a matter of law, and the motion should be granted if no factual development could possibly justify recovery." Id. In Smith v Dep't of Pub Health, 428 Mich 540, 544; 410 NW2d 749 (1987), the Michigan Supreme Court concluded that a state constitutional claim based on "custom or policy" could be brought against the state, and immunity was not available in such an action. The Supreme Court clarified in Jones v Powell, 462 Mich 329, 337; 612 NW2d 423 (2000), that "Smith only recognized a narrow remedy against the state on the basis of the unavailability of any other remedy." (Emphasis added.) Accordingly, we affirm the Court of Claims' conclusion that plaintiff's state due process claim could only proceed against MDOC, but not Schiebner, Gidley, and Warner.

We also affirm the Court of Claims' grant of summary disposition for defendant MDOC under MCR 2.116(C)(10). A due process violation against the state may only proceed in limited circumstances, such as when other remedies are unavailable. See *id*. The notice and opportunity MDOC provided before termination of plaintiff's employment, combined with the post-termination grievance procedure handled by MCO, satisfied the requirements of due process. The trial court properly granted summary disposition on plaintiff's claims against MDOC because adequate other remedies were available through the CSC.

In sum, none of plaintiff's arguments on appeal undermines the Court of Claims' ruling that MDOC complied with procedural due process when it provided plaintiff with notice of the charges and an opportunity to respond to them. Nor does MDOC's handling of the e-mails discovered after plaintiff's termination reflect a due process violation where plaintiff did not pursue a claim against the MCO or bring a timely claim to the CSC to challenge the MCO's representation.

2. DEFAMATION

With the exception of a statement that Schiebner made to his wife, the Court of Claims concluded that defendants were entitled to immunity because they made the allegedly defamatory statements within the scope of their employment, in good faith, and while acting with discretion when they made the statements while investigating plaintiff's Internet use. We agree.

The Court of Claims summarily disposed of this aspect of plaintiff's defamation claim under MCR 2.116(C)(8). MCL 691.1407 provides immunity for tort liability to state government employees. The Supreme Court interpreted MCL 691.1407(3) to conclude that state employees who assert the affirmative defense of qualified immunity must establish that

(1) the acts were taken during the course of employment and the employees were acting, or reasonably believed that they were acting, within the scope of their authority, (2) the acts were taken in good faith, and (3) the acts were discretionary-decisional, as opposed to ministerial-operational. [Odom v Wayne Co, 482 Mich 459, 468; 760 NW2d 217 (2008).]

Plaintiff argued that defendants Schiebner, Gidley, and Warner were not acting in good faith because they knew that plaintiff was not the one searching for the work-inappropriate websites based on a comparison of the web history and plaintiff's timecards. As we previously discussed, however, defendants investigated this claim and found that plaintiff was at work when searches for adult content websites were conducted. Thus, Schiebner, Gidley, and Warner acted in good faith when they discussed these searches, which they did within the scope of their authority in conducting an investigation.

Plaintiff's defamation claim against Schiebner, Gidley, and Warner also relies on people approaching plaintiff's wife at the American Legion, where she worked, and telling her that her husband was fired for looking at pornography. Plaintiff alleged that Schiebner, Gidley, and Warner told other "unidentified" MDOC employees that plaintiff "was terminated for 'looking at pornography' while at work." Plaintiff reasoned that they were responsible for rumors that reached plaintiff's wife because they "were primarily the ones aware of this investigation." This assertion is unsupported by any evidence. Plaintiff's speculation does not require reversal of the grant of summary disposition.

Regarding statements Schiebner made to his wife about having to investigate computer searches for pornography at home because he could not access the websites at work, we agree with the Court of Claims that dismissal was appropriate because the statements could not have been defamatory because they were substantially true. It is well established that, because defamation is based on "a false and defamatory statement concerning the plaintiff," *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 702; 609 NW2d 607 (2000), a substantially true statement cannot be the basis for a claim for defamation, see *Lawrence v Burdi*, 314 Mich App 203, 214-215; 886 NW2d 748 (2016); *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315, 332-333; 583 NW2d 725 (1998). "Furthermore, defendants in defamation suits

are not required to prove [that] the statement 'is literally and absolutely accurate in every minute detail.' " *Lawrence*, 314 Mich App at 215 (citation omitted). Accordingly, assuming that Schiebner's e-mail to Warner was an admission that he told his wife every detail of his investigation into plaintiff's computer usage at work, Schiebner's statements were substantially true, which precludes a claim of defamation.

Affirmed. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad /s/ Mark J. Cavanagh /s/ Thomas C. Cameron