

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1946

September Term, 2014

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DIANE SELTZER TORRE

v.

GLEN ECHO FIRE DEPARTMENT, ET AL.

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Meredith,  
Graeff,  
Arthur,

JJ.

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Opinion by Graeff, J.

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Filed: June 3, 2016

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Diane Seltzer Torre, appellant, filed a complaint in the Circuit Court for Montgomery County against Glen Echo Fire Department (“GEFD”) and Conduit Road Fire Board, Inc. (“CRFB”), appellees, alleging that she was discriminated against on the basis of her marital status, age, and family responsibilities in violation of Montgomery County Code (“MCC”) § 27-19 (2007).<sup>1</sup> Following discovery, appellees moved for summary judgment, which the court granted.

On appeal, Ms. Seltzer raises the following two questions for our review.

1. Did the trial court (Judge Robert Greenberg) err as a matter of law by using a “but-for” causation analysis, rather than the “motivating factor” causation analysis adopted by the Maryland Court of Appeals, to prove discrimination, thus committing reversible error in granting summary judgment to GEFD and CRFB as a result of applying the wrong causation standard?
2. Did the trial court (Judge Robert Greenberg) err as a matter of law by requiring Diane Seltzer Torre, as part of her prima facie case of discrimination, to provide record evidence of how comparators were treated, despite the fact that Maryland law has no such requirement and that the Montgomery County Code applies to employers with as few as one employee (and who thus may not even have comparators), thus committing reversible error in granting summary judgment to GEFD and CRFB because Ms. Seltzer Torre did not provide such evidence regarding comparators?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

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<sup>1</sup> Appellant refers to herself in the brief as Ms. Seltzer, and we shall do the same.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **I.**

#### **GEFD Volunteer Membership**

GEFD is an organization staffed by volunteer personnel who are trained to perform basic firefighting functions. The CRFB was established in 1933 by the Maryland General Assembly as a citizen-constituted body, and it was given authority to establish and oversee one or more fire departments, including GEFD.

GEFD’s “Administrative Members” are those “personnel who perform administrative duties for GEFD.” They are not permitted to ride in the fire or emergency apparatus for liability reasons, and they are not provided with Personal Protective Equipment (“PPE”). Administrative Members can be “probationary” or “full” members. To be a full Administrative Member, the member must have served a requisite probationary period, completed the required tasks to be made a full member, and be “voted in” as a full member. In its answers to interrogatories, GEFD stated that Administrative Members are required to volunteer a minimum of four hours per week, they must attend monthly membership meetings, and they assist with Bingo, the GEFD open house, and other station events. They do not need to commit to a 12-hour weekly duty night, or take the training classes necessary to be an Operational Member. There are no required duties for Administrative Members, but they are supposed to offer support to GEFD by working on publicity, fundraising activities, and providing administrative support, as needed. Administrative opportunities were discussed at the GEFD monthly membership meetings.

GEFD’s “Operational Members” are members who ride in apparatus in response to fire and/or emergency medical calls. Probationary Members are those who have not obtained “Charge” status and do not have voting rights. When a volunteer is accepted as an Operational Member, GEFD “requests that they obtain their ‘Charge’ status within twelve months. “Charge” status requires that the member complete all required classes, including EMT-B classes and Hazardous Materials Operations, pass a written examination, and successfully complete five calls. Probationary members, whether Administrative or Operational, “may at any time be dropped from the rolls of the Department at the Fire Chief’s recommendation.”

## **II.**

### **Chief Leusch**

Herbert Leusch was appointed Fire Chief at GEFD in the summer of 2009. As Fire Chief, he was responsible for GEFD’s management through “the development, administration, and implementation of departmental policies, rules, regulations, standards of operation, and emergency preparedness plans.” In addition to volunteering with the GEFD approximately twenty hours per week, Chief Leusch, who was then 43 years old, was also employed full-time and had childcare responsibilities for his two children, then ages 8 and 11.

## **III.**

### **Ms. Seltzer**

Ms. Seltzer was a divorced, 44-year-old mother of a 14-year-old boy and an 11-year-old girl, an employment lawyer, and a volunteer with GEFD, from October of 2009

until June 18, 2012, when she was terminated. During her legal career, Ms. Seltzer represented many firefighters and advised several fire departments with regard to employment matters. As a community member, Ms. Seltzer had “several positive experiences” with the firefighters at the GEFD, so she decided to become a volunteer at the station to “volunteer her time in a more formal, consistent way.” In 2009, she became an Administrative Member of GEFD. As an Administrative Member, Ms. Seltzer performed administrative duties, such as working on committees, attending membership meetings, and coordinating logistical services.

In 2010, Ms. Seltzer decided that she wanted to become an Operational Member of GEFD. She enrolled in EMT-B classes at the Public Safety Training Academy (“PSTA”), and by the end of the summer in 2010, she became a certified EMT-B. Ms. Seltzer subsequently became an Operational Member and was assigned to a weekly shift at GEFD that began at 7:00 p.m. on Wednesday and ended at 7:00 a.m. on Thursday. As an Operational Member, Ms. Seltzer rode in the ambulance, as well as assisted GEFD with its mandatory activities, including membership meetings, open houses, and bingo nights.

In the summer of 2011, Ms. Seltzer began to have difficulty keeping up with her riding responsibilities because her son’s Bar Mitzvah was scheduled for October 1, 2011, and “she had a great deal of work to do in connection with planning that event.” She also realized that having one night per week where her sleep schedule was interrupted made it difficult for her to work the next day in her job as a lawyer. Moreover, Chief Leusch began pressuring her to obtain “Charge” status, which would require her to enroll in more classes at the PSTA and would give her greater responsibility for patient care. Although

Ms. Seltzer did enroll in one class, she was not able to enroll in all of the required classes due to work obligations and childcare responsibilities. Ms. Seltzer stated in her complaint that it became clear that she would not be able to obtain “Charge” status within the time frame Chief Leusch required.

#### **IV.**

##### **Emails Regarding Ms. Seltzer’s Status**

On January 30, 2012, Ms. Seltzer sent Chief Leusch a “long overdue” email regarding her riding schedule. Because she was not able to ride every week, she requested the opportunity to do a combination of administrative and operational work. She suggested that she could “take the lead on activities like Open House or Bingo Night, or be responsible for managing [the GEFD] FaceBook page,” and “ride every Wednesday C shift [once every three weeks] from 7 pm until 11 pm and one additional Wednesday night from 7 pm to 11 pm each month.” Ms. Seltzer admitted at her deposition that she was not aware of any other GEFD member who worked in a similar combination capacity, noting that there was only one other Administrative Member, Adele Seifried, who was 65 years old, married with grown children, and a very active volunteer.

On February 3, 2012, Chief Leusch responded to Ms. Seltzer’s email, stating that operational probationary members typically were permitted one year to achieve charge status, and he believed that administrative membership was “the best solution for her.” He stated that help was needed with the Auxiliary, Bingo, and assisting Ms. Seifried. He further stated that Ms. Seltzer could work “almost entirely at home,” but she would still be required to attend monthly membership meetings. He suggested duties including recruiting

volunteers to help staff the Auxiliary, coordinating food and beverage services for GEFD events, and conducting other similar tasks in coordination with CRFB Director Chris White (“Director White”). Chief Leusch explained that this arrangement should provide Ms. Seltzer with the flexibility she sought, but she would need to “send weekly email updates” about the work that she was doing, and his expectation was that she would work approximately four hours per week. Ms. Seltzer would be required to track her hours because being an active GEFD Administrative Member “require[d] 25 points per year.” Chief Leusch asked Ms. Seltzer to let him know her thoughts before the February membership meeting, so that he could “report the change to the affected parties.”

On February 14, 2012, Director White emailed Ms. Seltzer, advising her that GEFD would welcome her participation as an Auxiliary/Administrative Member. He listed some of the proposed activities for the Auxiliary, including: Non-EMT bike patrol; CPR/First Aid classes for the community; professional services; car seat checks; change your clock, change your battery community events; fundraising; disaster response preparedness; supplies; community coordination; non-emergency disaster response; recruitment and retention events; pool party; Sycamore Island Party; pancake breakfasts; and birthday fundraisers. Director White asked Ms. Seltzer to provide him with feedback.

On February 20, 2012, Ms. Seltzer responded by a “more general email” to Director White and Chief Leusch, “saying that most or some of those things sounded good to” her. She thanked Director White and Chief Leusch for their emails regarding her “continued participation . . . as an administrative member,” stating that the activities of which Director White spoke in his e-mail were “like things in which she would be interested, and she

would like to remain a volunteer in the capacity in each of your e-mails.” She stated that she would maintain her EMT-B certification and status, and would “complete all necessary courses, protocol updates, refreshers, and the like to ensure that [her] EMT-B certification remains up to date.” She asked to continue to receive all emails that Operational Members received relating to maintaining EMT-B certification and status. She thanked them for working with her to find a solution and asked that they “let [her] know [her] next steps.”

Later that day, Chief Leusch responded to her email. He stated that he would “reflect [her] status as administrative,” and she was “assigned to the GEFD Auxiliaries.”<sup>2</sup>

Ms. Seltzer testified in her deposition that she thought her email response would “lead to a . . . sit down” conversation where Director White could explain his “vision.” She did not call Director White to follow-up, nor did she make any effort to schedule a meeting with him to “flesh out” his vision. She explained that Director White “was the boss, I was the worker bee. So if he wanted to meet, then I would think he would propose a meeting.” She assumed that, if Director White “wanted to give [her] something specific to do,” he would have told her. She stated that she did not have any timeframe for getting involved, as there “was really no formal process for assigning administrative work,” and she would

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<sup>2</sup> Chief Leusch stated that she should “consider the tasks listed in Director White’s e-mail as [her] performance plan.” He explained that, once her status was changed from Operational Member to Administrative Member, she would no longer be allowed to ride apparatus, and he requested that she return her PPE. Ms. Seltzer responded that she did not understand why she would be prohibited from riding, as she was a fully certified EMT-B, nor did she understand why she would need to return her PPE gear, as another volunteer, Kate Crowley, who had graduated in her EMT-B certification class, had not yet obtained “charge” status, but was not required to return her gear. Chief Leusch responded that “only operational members . . . are allowed to ride apparatus; only members who ride apparatus need PPE.”



“[f]ind something to do.” She did not reach out to Director White because she had asked him to let her know the “next steps,” and “the ball was in his court to tell [her] what he needed.”

## V.

### **Ms. Seltzer’s Role as Administrative Member**

Initially, when Ms. Seltzer transitioned to an Administrative Member, her supervisor was Director White. When Deputy Chief Joe Chornock joined the GEFD, Ms. Seltzer was transferred to him. Chief Leusch explained that Ms. Seltzer’s assignments were “changed a few times[] in the hope that someone would inspire her to actually spend time volunteering.”

On March 12, 2012, during GEFD’s monthly membership meeting, Chief Leusch stated that he needed someone to organize and plan a banquet. Ms. Seltzer volunteered; she stated that she was given a \$10,000 budget. Following the meeting, Ms. Seltzer “started doing research and sending e-mails and looking on Maggiano’s website and calling their banquet people” to find out information about available rooms, packages, and dates. She was “very excited” because she thought that she could plan the banquet for \$3,500. She did not contact any other restaurants besides Maggiano’s because she already knew, from her research during planning for her son’s Bar Mitzvah, “what restaurants had rooms and what didn’t.” Subsequently, Ms. Seltzer sent an email to the entire membership of GEFD about holding the banquet at Maggiano’s.

Chief Leusch replied to Ms. Seltzer’s email, thanking her for “getting the ball rolling on the banquet,” but stating that, before “getting the membership’s expectations too high,

please provide me with estimates for various options, including local parks, so that we can be responsible fiscal stewards and explore the less costly options.” He directed Ms. Seltzer to coordinate with Director White, who previously had booked locations that could be used for the banquet. He explained that the “goal is to find a place where the GEFD ‘family’ can gather and enjoy fellowship and food and try to minimize cost.” He stated that he “looked forward to hearing about the different alternatives,” and once “leadership approves a proposal, then we will communicate the proposal to” GEFD. Chief Leusch did not recall providing Ms. Seltzer with a \$10,000 budget, and even if he had, the budget would have needed to be approved by the CRFB after it was given estimates.

Ms. Seltzer emailed Chief Leusch, stating that she would “not have time to research local parks,” and she had “no experience in what goes into planning an outdoor event where permits may be needed (for events and alcohol, if even allowed at all), tents may need to be rented, weather needs to be considered, and the attendees are doing all of the work in terms of bringing equipment, purchasing food and drinks and paper products and utensils and the like, and setting up, cooking, and cleaning up.” Her email explained that she was able to find “an excellent restaurant that can likely do our event” for a fraction of the \$10,000 budget she had been given, and she did not “understand why . . . this isn’t good enough. It is extremely frustrating.” She stated that, if “anyone is able to secure a park and all that goes with it, [she would] gladly help coordinate the event.”

Ms. Seltzer did “a little research on Montgomery County parks,” which in her view was “not remotely what a banquet is” because, in her “world, we don’t do banquets in parks.” She then emailed Chief Leusch with website links to the Montgomery County

Parks page. Ms. Seltzer, who had spent “a couple of hours” “researching [the banquet project] and putting the e-mails together and responding to them,” did not take any further action regarding the banquet. According to Ms. Seltzer, “[w]ithout a firm budget, [she] could not do additional work planning the . . . banquet,” so she “temporarily suspended [her] efforts while awaiting budget confirmation from” Chief Leusch.

According to Ms. Seltzer, “[w]hile waiting for other assignments,” she “tried to show initiative and worked as the GEFD liaison with parent volunteers at Wood Acres Elementary School (‘WAES’) to ensure that emergency personnel and equipment were present at the Wood Acres Jogfest 5k,” which was to be held on May 12, 2012. In doing so, she sent out an email to GEFD members to try to get volunteers and worked with appropriate personnel to authorize dispatch of GEFD equipment to the event. Specifically, on March 30, 2012, she forwarded an email from WAES, where her daughter attended school, to Chief Leusch and Steve Cox, GEFD’s Departmental Coordinator, asking whether WAES had contacted GEFD about bringing apparatus to Jogfest. Chief Leusch responded that he had not been contacted, and that he appreciated her working with Mr. Cox to “make it happen.”

On May 7, 2012, Ms. Seltzer sent out an email to all GEFD members seeking volunteers for Jogfest. She thought that, between March 30 and May 7, she “would have . . . somehow communicated with Steve Cox” with regard to apparatus and “would have sent out something . . . asking for help staffing apparatus.” Other than that, Ms. Seltzer’s work on Jogfest included “talk[ing] up the event, just tell[ing] people what it is and . . . just chat[ting] it up.” She also attended Jogfest as a GEFD volunteer on race day.

Ms. Seltzer did not keep track of the amount of time she spent working on Jogfest, but it was not “that much time,” maybe two to three hours of emails and three hours volunteering on race day. Ms. Seltzer was “still willing to ride the ambulance on a reduced schedule,” and she “offered to do administrative paperwork.” “Basically, she wanted to make herself available to contribute in any way she could.”

Chief Leusch’s recollection as to Ms. Seltzer’s contributions to Jogfest was that she volunteered to be the liaison and sent out an email to GEFD members. He thought that she had “no follow-through.” When Chief Leusch arrived at the race, “no scheduling had occurred, there was no knowledge of it.” When he asked Ms. Seltzer who the race organizer was so he could coordinate placement of apparatus, Ms. Seltzer indicated that she did not know. Chief Leusch then had to “reach out to career personnel to bring over the apparatus” because there were no volunteers scheduled to drive the apparatus. Chief Leusch saw Ms. Seltzer’s role in Jogfest as being “limited to sending a blast email out.”

Chief Leusch testified that, as of May 2012, Ms. Seltzer “had not made any effort to volunteer as she stated she would in her February 20th email.” She had taken “no or insufficient action to participate as a GEFD volunteer,” having only volunteered a total of 8.5 hours in 2012, when she should have been volunteering a minimum of four hours per week. Accordingly, on May 29, 2012, Chief Leusch emailed Ms. Seltzer asking her to “assume responsibility for the annual Open House; birthday parties (to include coordinating the scheduling with [GEFD’s office coordinator, Danielle Thomas] and DFRS personnel, staffing, advertising, etc.); and helping [Ms. Thomas] with administrative functions.” He requested that Ms. Seltzer provide her “calendar of prospective hours in

advance to” Deputy Chief Chornock and Ms. Thomas on the first of each month and provide them with a “certified time sheet of [her] accomplishments for the previous month (to include how much time was spent on each specific duty) so that [she] can earn LOSAP points.”<sup>3</sup> He reminded her that “only productive time spent in the station will count towards LOSAP.”

Ms. Seltzer responded, asking Chief Leusch, *inter alia*: (1) what he meant by “a calendar of prospective hours”; (2) what “administrative functions” he was referencing; (3) whether time working from home counted toward LOSAP points; and (4) whether other administrative and/or probationary members who were not yet operational EMT-B’s would be assisting her with the tasks he referenced. Chief Leusch answered: (1) “This would be the hours when you can cover a birthday party or would be available to assist [Ms. Thomas], for example, so that we can plan on your availability”; (2) “Mostly TBD based on [Ms. Thomas’s] needs. Could include stuffing fundraising envelopes, for example”; (3) that GEFD work done remotely does count toward LOSAP, but that unproductive time spent at the station did not; and (4) that it was up to Deputy Chief Chornock to assign or recruit additional administrative personnel, when appropriate.

Ms. Seltzer responded that she is “not available on weekends to assist with birthday parties, as I have children of my own who I am with on weekends.” She stated: “That task seems much better suited to non-EMT-B certified probationary members who are not

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<sup>3</sup> LOSAP stands for “Length of Service Awards Program,” MCC § 21.02.16.03(i), and it applies to “all current and former Montgomery County local fire and rescue department volunteers.” MCC § 21.02.16.02.

riding apparatus and who do not have parental responsibilities of their own.” Further, she “did not remember this being on the list of tasks that you sent to me when I switched from being operational to being administrative,” and she was “surprised that of all the non-apparatus riding members, you would think I am best suited to host birthday parties on weekends.” She also asked what “days/hours would [Ms. Thomas] like me to be available to assist her?” Chief Leusch responded:

I have listed what are the needs of the Department which have been assigned to the Auxiliary; we only have two administrative members, so there is not a lot of flexibility. If you cannot staff the birthday parties yourself, you should coordinate with personnel that can. I will let Danielle respond as to when she needs your help; you should plan around 4 hours per week. Out of curiosity, what were you thinking of contributing to the GEFD? And what have you accomplished since you became an administrative member?

Chief Leusch testified that Ms. Seltzer focused on the banquet and Jogfest as her “major contributions” to the GEFD. He also testified that GEFD needs to host properly organized birthday parties as they are a good source of funds for the department.

Ms. Seltzer believed that asking her to coordinate staffing of birthday parties if she could not staff them herself was “a distinction without a difference” because “no one likes the birthday parties,” and therefore, volunteers either did not sign up to staff parties or did not show up. Ms. Seltzer had heard rumors that Chief Leusch was going to “try to get [her] to do birthday parties, because he knew [she] couldn’t do them because of [her] kids, as a way to get rid of [her].” She did not respond to Chief Leusch’s email.

On May 29, 2012, Ms. Thomas informed Ms. Seltzer that she did not currently need any assistance, but when she did, she would let Ms. Seltzer know. Ms. Seltzer responded:

Sounds good, [Ms. Thomas]. You know I'd be happy to help you out. I work full time, but you could always leave something for me to do when I get home from work. I have my kids on Monday and Tuesday nights, so Wednesday and Thursday nights tend to be more flexible for me. Don't hesitate to ask me for help! (I'm sorry about the birthday party thing – that one is next to impossible for me because of the kids. I'm sure you understand that.).

Ms. Thomas responded that she would keep Wednesdays and Thursdays in mind.

## VI.

### **Ms. Seltzer's Termination**

On June 18, 2012, at GEFD's monthly membership meeting, Chief Leusch noted that members who had not been active, i.e., had not received a minimum of 50 LOSAP points in a year, and those who had not reached "charge" status within a year, would be dropped from membership, unless they had been granted an extension. This policy had been in place since 2011. At every monthly meeting since he was Fire Chief, Chief Leusch dropped inactive members who did not voluntarily resign. At the June 18 meeting, Chief Leusch noted a list of seven members who were being dropped from membership, including Ms. Seltzer.

According to Chief Leusch, after he informed Ms. Seltzer that she was being dropped as a member, he turned the floor over to her to allow her to discuss her contributions to GEFD and why she should remain a member. Ms. Seltzer responded that she had contributed to the banquet and Jogfest, which Chief Leusch believed accounted for no more than a few hours of activity. The discussion then turned to the fact that Ms. Seltzer was instructed to provide her hours of availability to Ms. Thomas, but had not done so. The discussion then turned contentious, and instead of indicating that she wanted to remain

a member, Ms. Seltzer became agitated and “kept focusing on . . . [Jogfest] and the banquet as [her] major contributions to the department.” When the conversation kept “going around and around and around,” Chief Leusch made the decision to dismiss Ms. Seltzer. Chief Leusch stated that birthday parties were “one of many opportunities for [Ms. Seltzer] to take over a task that would have indicated” that she would be a valuable GEFD member. He stated that Ms. Seltzer had refused to do “[p]retty much every” task he asked her to do, including birthday parties, and that his decision to dismiss her was based on her refusal to take “ownership of any of them, essentially seen as refusing them.” He also noted that she had offered to provide legal services to the department, which she had later rescinded.

Ms. Seltzer gave a different version of events at the meeting. She stated that Chief Leusch asked her what she had done to contribute to GEFD, and she responded by discussing her work on the banquet and for Jogfest. Chief Leusch then asked “what about the birthday parties?” Ms. Seltzer responded that, as she had told him before, she could not “do birthday parties on weekends because [she has] her own children to take care of on the weekends.” Chief Leusch responded: “[W]ell, then you have nothing to offer this department and I am removing you as a member.” After overcoming her shock, Ms. Seltzer responded that the “only thing more disgusting than what you just did is the way you did it in this room full of people.” Ms. Seltzer then asked Ms. Seifried to please record the events in the minutes of the meeting, but the minutes only reflect that “Diane Seltzer was told that she is also being dropped as an administrative member.”



## VII.

### Complaint

On January 17, 2013, Ms. Seltzer filed a “Charge of Discrimination” with the Montgomery County Office of Human Rights (“OHR”) against appellees, alleging that she was discriminated against on the basis of her marital status, age, and family responsibilities, in violation of MCC § 27-19. On June 18, 2013, the OHR found no reasonable grounds to find that a violation of MCC § 27-19 had occurred, and there was no indication of discrimination based on age, marital status, or familial responsibilities.

Subsequently, on November 18, 2013, Ms. Seltzer filed a six-count complaint in the circuit court against appellees.<sup>4</sup> In the complaint, Ms. Seltzer asserted that she was “the only volunteer who was 44 years old, divorced, had childcare responsibilities and was discharged when she said that, because of her divorced status and childcare responsibilities, she could not host birthday parties at the firehouse on weekends.” She asserted that she was “the only one removed from membership for not being able to host birthday parties.”

Ms. Seltzer identified fourteen volunteer members between the ages of 16 to early 20’s, who were single and had no childcare responsibilities. She also identified ten volunteer members in their mid-20’s, who did not have childcare responsibilities and all of whom, except for one, was single. She identified one individual in his 30’s, who was “believed to be single. It is unknown whether he has childcare responsibilities.” Of the

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<sup>4</sup> On July 25, 2014, Ms. Seltzer filed an amended complaint adding Chief Leusch as a defendant. On October 30, 2014, the court granted Chief Leusch’s motion to dismiss. Ms. Seltzer does not appeal from that ruling.

other volunteers in their mid-40's, as Ms. Seltzer was, one was married and one was single, and neither had childcare responsibilities. Two volunteers, one of whom was Ms. Seifried, were age 50 or older, and both were married, but did not have childcare responsibilities. Aside from listing the individuals seriatim, the complaint offered no other facts to establish whether any of the foregoing individuals were asked to host birthday parties and refused, or whether they were, like Ms. Seltzer, Administrative Members.

## VIII.

### **Ms. Seltzer's Deposition Testimony**

Ms. Seltzer testified at her deposition that Chief Leusch fired her based on her family responsibilities. In support, she stated that, upon her announcement that she could not “do something because of [her] responsibility to her children, he fired” her. She also stated that Chief Leusch's attitude became “hostile and unfriendly when [she] made it clear that” she could not obtain charge status because she was divorced and shared custody of her children.

When asked what the factual basis was for her assertion that she was dropped from membership because of her age, Ms. Seltzer responded: “There is no one else who is 40 or over who has not been able to do birthday parties on weekends who has been dropped as a result. No one else has been dropped as a result.” When asked what her factual basis was for her assertion that she had been dropped from membership because of her marital status, Ms. Seltzer responded: “There's no one else who is divorced . . . who could not do birthday parties because of their marital status and concomitant custody issues. So there was no one else in that category who was dropped for not doing birthday parties.” When

asked what her factual basis was for her assertion that she was dropped from membership because of her family responsibilities, she responded:

[Chief Leusch] did not like that I was leaving the operational side because I couldn't get charge status, and obviously he had pressured the membership about getting charge status.

Did not like when I said . . . I cannot do this . . . because of my kids, watching them, going to swim meets, I can't take this Hazmat ops class. That was when I noticed there was a change because I was saying I couldn't do something because of my kids.

And then as time went on, when I went to become administrative, out of all the things that I can do, the one thing he was sticking on that I couldn't do was birthday parties because I had children that I had to take care of on the weekends.

And I had never done birthday parties before as an administrative member, had never been an issue, was not in his e-mail to me in February when he brought up the things that I could do almost exclusively from home except monthly meetings.

So it began to feel like he was – and from what I heard through the rumor mill . . . that there was going to be a set-up to get rid of me because he didn't like that I wouldn't do birthday parties because of my kids.

As far as identifying specific individuals from whom she was treated differently, Ms. Seltzer identified only Kate Crowley. She did not know how old Ms. Crowley was or whether she was married. She thought that Ms. Crowley had “at least one child who [she] thought was grown.” She agreed that Ms. Crowley was an Operational Member. Ms. Seltzer did not know whether Ms. Crowley had requested any accommodations from Chief Leusch to maintain her operational status, and she did not know whether Ms. Crowley had asked to become an Administrative Member.

Ms. Seltzer agreed that at no time during her employment with GEFD did she become a voting member. She also agreed that she did not keep track of the hours she spent volunteering.

## IX.

### **Motion for Summary Judgment**

In their motion for summary judgment, appellees asserted that Ms. Seltzer was terminated from volunteer membership because “she failed to volunteer as required as either an operational or administrative member per the GEFD Executive Regulations and Standby Policy.” They stated that Ms. Seltzer had “not been performing any volunteer activities for GEFD and was not setting a good example for other volunteer and junior members of the department,” and her “age, marital status and/or family responsibility had absolutely nothing to do with this decision.”

Appellees asserted that, to establish a *prima facie* case of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), Ms. Seltzer had to show that she (1) was a member of a protected class; (2) was performing her duties in a satisfactory manner; (3) suffered an adverse employment action; and (4) was treated less favorably than similarly situated individuals outside of her protected class. They asserted that she failed to show two prongs. First, Ms. Seltzer could not establish that she was performing her duties as a volunteer satisfactorily. Second, she could not establish that she was treated less favorably than similarly situated individuals outside of her protected class, i.e., divorced, over 40, with children. In that regard, they asserted:

In her Complaint, [Ms. Seltzer] alleges that she was the only volunteer who was 44 years old, divorced, with childcare responsibilities that was discharged because she could not host birthday parties at the firehouse on weekends. Interestingly, [she] does not provide facts which establish just who these others are and whether they were similarly situated to her, i.e., administrative volunteer members who were not volunteering. In her deposition, [she] identified “Kate Crowley” (“Crowley”) as . . . the member she was being treated differently from. She did not know Crowley’s age or whether she was married. She thought that Crowley had at least one “older child.” However, [Ms. Seltzer] and Crowley were not similarly situated because Crowley was an operational member that resigned in March 2012. Likewise, [she] complains that “Chase Smith” (“Smith”) stayed on as an operational member for 35 months without obtaining Charge Status. Again, there is no evidence that Smith was an administrative member and, given [Ms. Seltzer’s] testimony, he was working toward “Charge Status;” therefore, he was an operational member.

(footnotes omitted).

## X.

### **Opposition to Motion for Summary Judgment**

In her opposition, Ms. Seltzer conceded that she had presented no direct evidence of discrimination. She stated that, “like most employees,” she would present circumstantial evidence of discrimination, which an employee is permitted to do under *McDonnell Douglas*. Ms. Seltzer listed the elements that a plaintiff must establish to make out a *prima facie* case as follows: “(1) she is a member of a protected minority; (2) she was discharged from employment; (3) she was qualified for the job in which she was working; and (4) she was discharged under circumstances raising a reasonable inference of intentional discrimination.” She also asserted that, in a discrimination case “under the [MCC],” the employee “bears the burden of persuasion that discrimination was ‘a motivating factor,’”

and the employee need not prove that, “but for the discrimination, she would not have been discharged.”

To establish her claim that “[n]o one else has been terminated for being unwilling or unable to host birthday parties,” she cited the following deposition testimony of Chief Leusch:

[Ms. Seltzer]: has anyone been terminated for refusing to host birthday parties?

[Chief Leusch]: No. Including yourself.

She further noted that appellees had not produced any evidence “demonstrating the number of hours Administrative Member Adele Seifried volunteers each week or describing the work she does that Ms. Seltzer did not do as an Administrative Member.” She asserted that the failure to produce that evidence “can only be interpreted as confirmation that their claim that Ms. Seltzer failed to fulfill this alleged requirement is nothing more than pretext for discrimination.”

## **XI.**

### **Hearing**

On October 30, 2014, the circuit court held a hearing on appellees’ motion for summary judgment. Appellees stated that it was undisputed that, during her entire tenure at GEFD, Ms. Seltzer was a probationary member and could have been dismissed by Chief Leusch at any time. With respect to the issue of disparate treatment, appellees argued that Ms. Seltzer offered only one other “purely administrative member” of GEFD, Ms. Seifried, “who was not similarly situated because she was older and was doing different tasks than”

Ms. Seltzer. Appellees asserted that it was Ms. Seltzer’s burden to show that there was improper motive for her termination, but she offered only “supposition and conjecture.”

When asked by the court, Ms. Seltzer agreed that, to meet a *prima facie* case for discrimination, she had to show that she was treated less favorably than similarly situated individuals outside of her protected class. She advised the court that Ms. Seifried was the appropriate comparator, the person she relied upon to show disparate treatment.

The court then asked Ms. Seltzer why she thought she was treated differently and what the undisputed evidence showed that indicated that she was treated differently from Ms. Seifried. Ms. Seltzer stated that Ms. Seifried

did other administrative work, she never hosted a birthday party, she never, I don’t know if she was asked to, and if she was asked to and didn’t, I don’t think her reasons would be that she was a divorced parent of young children, because she is, to my knowledge, doesn’t have young children.

And then, other people who refused to host birthday parties, who didn’t have children, they just refused because they didn’t feel like doing it, because it wasn’t fun, because nobody wanted to do it. Out of 40 something volunteers, no one wanted to do it. None of them were terminated.

When asked if there was sworn testimony or an affidavit to support her allegation that she was treated differently from Ms. Seifried, Ms. Seltzer stated that she had quoted in her opposition Chief Leusch’s testimony that no one else had been terminated for being unwilling or unable to host birthday parties. She stated that appellees had failed to produce in discovery the number of hours Ms. Seifried volunteered or the type of work she did.

After hearing arguments, the court ruled as follows:

I looked at, again, at the statute upon which [Ms. Seltzer’s] claim is based, and that statute, in my view, clearly is a but for statute. It says it in as many words, that a person must not, because of sex, marital status, family

responsibilities, or because of any reason that would not have been asserted but for the age, sex, marital status, family responsibilities, and then you can't be treated differently. So I think regardless of whether I use the analysis that was offered by [Ms. Seltzer] or the analysis that's offered by [appellees], there's got to be a showing that someone is being treated differently. Someone who is in all other respects, the same, similarly situated, but doesn't have those characteristics that are set out in the statute, namely the age, marital status, family responsibilities, and so forth.

[Ms. Seltzer] . . . has acknowledged that the only person that fits that description is Ms. [Seifried], and she is referenced in [her] memorandum, but there's no sworn testimony anywhere in the record that's been offered to me suggesting what it is that she is permitted to do or not permitted to do that's different from [Ms. Seltzer]. And if she is, in fact, the comparator, there's got to be a demonstration by sworn testimony that she is similarly situated but she doesn't have the same characteristics as the plaintiff does that are protected by the statute, and she gets more favorable treatment. And the fact that there may have been discovery requested, and that it wasn't responded to, which I don't find, I don't know that situation, is just simply not sufficient for [Ms. Seltzer] to demonstrate that. So, in the absence of that, I don't find any evidence that someone else was treated more favorably than she was, and I do think that under either analysis, that's got to be shown by the plaintiff and not by the defendant. It's not for the defendant to rebut, in my view, at this time. So, since there's no evidence to show that [Ms. Seltzer] was disparately treated, I'm going to grant the motion for summary judgment.

### **STANDARD OF REVIEW**

Maryland Rule 2-501(f) governs motions for summary judgment and provides that a trial court “shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.” *Accord Reiter v. Pneumo Abex, LLC*, 417 Md. 57, 67 (2010). A determination “[w]hether a circuit court’s grant of summary judgment is proper in a particular case is a question of law, subject to a non-deferential review on appeal.” *Tyler v. City of College Park*, 415 Md. 475, 498 (2010).



Thus, the standard of review of a trial court’s grant of a motion for summary judgment on the law is *de novo*. *D’Aoust v. Diamond*, 424 Md. 549, 574 (2012).

When we consider a circuit court’s order granting summary judgment, we “review the record in the light most favorable to the non-moving party and construe any reasonable inferences that may be drawn from the facts against the moving party.” *Rhoads v. Sommer*, 401 Md. 131, 148 (2007). *Accord Reiter*, 417 Md. at 67 (“[W]e independently review the record to determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law.”) (quoting *Livesay v. Baltimore County*, 384 Md. 1, 10 (2004)).

“[T]he purpose of the summary judgment procedure is not to try the case or to decide the factual disputes, but to decide whether there is an issue of fact, which is sufficiently material to be tried.” *Sadler v. Dimensions Healthcare Corp.*, 378 Md. 509, 534 (2003) (quoting *Taylor v. NationsBank*, 365 Md. 166, 173 (2001)). For summary judgment purposes, “[a] material fact is a fact the resolution of which will somehow affect the outcome of the case.” *Pence v. Norwest Bank Minn., N.A.*, 363 Md. 267, 279 (2001) (citation omitted).

“[T]he mere existence of a scintilla of evidence in support of the plaintiffs’ claim is insufficient to preclude the grant of summary judgment; there must be evidence upon which the jury could reasonably find for the plaintiff.” *Crickenberger v. Hyundai Motor America*, 404 Md. 37, 45 (2008) (quoting *Beatty v. Trailmaster Prods, Inc.*, 330 Md. 726, 738-39 (1993)). “[W]hile a court must resolve all inferences in favor of the party opposing

summary judgment, those inferences must be reasonable ones.” *Id.* (quoting *Beatty*, 330 Md. at 739).

## DISCUSSION

Ms. Seltzer contends that the circuit court erred in granting appellees’ motion for summary judgment for two reasons. First, she argues that the court incorrectly applied a “but for” standard of proof for proving discrimination under MCC § 27-19. Second, she asserts that the court “incorrectly required [her] to show comparator evidence” to prove that a similarly situated individual was treated differently from her.

We will address each contention, in turn. First, however, we will address generally the law regarding discrimination.

Ms. Seltzer brought her discrimination claim under MCC § 27-19, which states, in pertinent part, as follows:

(a) A person must not because of the race, color, religious creed, ancestry, national origin, age, sex, marital status, sexual orientation, family responsibilities, or genetic status of any individual or disability of a qualified individual, or because of any reason that would not have been asserted but for the race, color, religious creed, ancestry, national origin, age, sex, marital status, disability, sexual orientation, family responsibilities, or genetic status:

(1) For an employer:

(A) fail or refuse to hire, fail to accept the services of, discharge any individual, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment.

In her opposition to appellees’ motion for summary judgment, Ms. Seltzer conceded that she had no direct evidence of discrimination, and she stated that she would meet her burden of proof by “present[ing] circumstantial evidence of discrimination” under the “judicially created proof scheme established by *McDonnell Douglas*.”

Under the *McDonnell Douglas* framework, applicable when, as here, the complainant does not have direct proof of an intent to discriminate, the complainant first must establish a *prima facie* case of discrimination, which gives rise to a rebuttable presumption of discrimination. *State Comm’n on Human Relations v. Kaydon Ring & Seal, Inc.*, 149 Md. App. 666, 676-77 (2003). If the plaintiff meets her burden in this regard, the burden of production shifts to the employer to state a legitimate, non-discriminatory reason for the action complained about. *Id.* at 676. If the employer meets this burden, the burden shifts back to the employee to “prove, by a preponderance of the evidence, that the employer’s stated reason for the termination was a pretext.” *Id.* at 676-77.

Here, the circuit court granted appellee’s motion for summary judgment after finding that Ms. Seltzer had not established a *prima facie* case of discrimination. We thus turn to Ms. Seltzer’s two asserted grounds of error in this regard.

## I.

### Causation Analysis

Ms. Seltzer first argues that the court incorrectly applied a “but for” causation standard, which she asserts has been “squarely rejected” by Maryland courts. She argues that the appropriate burden of proof is that discrimination was a “motivating factor,” and the circuit court “committed reversible error by applying the wrong legal standard for demonstrating causation.”

Appellees disagree. They contend that the court properly granted summary judgment because Ms. “Seltzer failed to establish a *prima facie* claim for discrimination

regardless of whether the trial court used a ‘but for’ test or ‘motivating factor’ test.” We agree.

Here, the basis for the court’s grant of summary judgment was that Ms. Seltzer had not shown, contrary to her contention, that she was treated differently, or disparately, due to her age, marital status or family responsibilities, and therefore, she failed to carry her initial burden of making a *prima facie* case, the first step necessary to shift the burden of production to appellees. Accordingly, the court never reached the issue whether Ms. Seltzer’s protected class was a “but for” or “motivating factor” in her termination. We perceive no cause for reversal in this regard.

## II.

### Evidence of Similarly Situated Individuals

Ms. Seltzer next asserts that the court “incorrectly required [her] to show comparator evidence” to prove that a similarly situated individual was being treated differently from her. She asserts that her burden was merely to generate evidence that she was discharged under circumstances raising a reasonable inference of intentional discrimination, which she did.

Appellees contend that Ms. Seltzer has waived this argument. In support, they state that she never raised this argument below “and, in fact, conceded that comparator evidence was required in order to establish a *prima facie* claim” under *McDonnell Douglas*.

As Ms. Seltzer recognized below, in a termination of employment case, the method of establishing a *prima facie* case of discrimination differs depending on the factual situation. *McDonnell Douglas*, 411 U.S. at 802. *See also Levitz Furniture Corp. v. Prince*

*George's County*, 72 Md. App. 103, 112 (“Under *McDonnell Douglas*, the complainant has the initial burden to set forth a *prima facie* case of unlawful discrimination. Just how that is done in the context of termination of employment is the subject of some disagreement.”), *cert. denied*, 311 Md. 286 (1987). This Court explained:

Although the various formulations of the *prima facie* case differ in some respects, they share a common nucleus of thought: a *prima facie* case is established when a member of a protected group is discharged under circumstances which, if unexplained, would support an inference that the decision to discharge was “based upon a consideration of impermissible factors.”

*Levitz Furniture*, 72 Md. App. at 112 (quoting *Furnco Construction Co. v. Waters*, 438 U.S. 567, 577 (1978)).

Although not the only method to make this showing, proof of intent to discriminate may be shown circumstantially by proof of disparate treatment by an employer of similarly-situated employees outside the protected class. *Kaydon Ring & Seal*, 149 Md. App. at 702 (“Proof of an intent to discriminate . . . may be shown circumstantially by proof of disparate treatment by an employer of similarly situated employees.”). That was Ms. Seltzer’s theory of the case here. She asserted that, because of her age, marital status, and family responsibilities, she was treated differently from other volunteers who did not host birthday parties.

Although she now asserts that the circuit court erred in requiring her to show comparator evidence to make a *prima facie* case, she never made such an argument below. Indeed, at the hearing, she expressly conceded that comparator evidence was required to establish a *prima facie* claim of discrimination, and she stated that Ms. Seifried was

“absolutely” the person to whom she should be compared. Under these circumstances, where the issue presented on appeal was not raised in the circuit court below, we will not consider it. *See* Md. Rule 8-131(a) (“Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court.”).

**JUDGMENT AFFIRMED. COSTS  
TO BE PAID BY APPELLANT.**