TH 02-0224-C Y/H Pruett v Columbia House
Judge Richard L. Young Signed on 3/31/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

SANDRA L. PRUETT,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 2:02-cv-00224-RLY-WGH
	)	
THE COLUMBIA HOUSE COMPANY,	)	
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

SANDRA PRUETT, Plaintiff,	)	
vs.	)	2:02-cv-224-RLY-WGH
THE COLUMBIA HOUSE COMPANY, Defendant.	)	

ENTRY ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, and DEFENDANT'S MOTION TO STRIKE PORTIONS OF PLAINTIFF'S SURREPLY BRIEF

Plaintiff, Sandra L. Pruett ("Plaintiff"), worked for the Columbia House Company ("Columbia House") as a Spanish-speaking Customer Service Representative in Club Musica Latina ("CML") for approximately four and one-half years. Plaintiff asserts that Columbia House terminated her employment because of her national origin, in retaliation for exercising her rights under the Family and Medical Leave Act ("FMLA"), and for allegedly raising complaints of national origin discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 200e et seq. ("Title VII").

Columbia House now moves for summary judgment and moves to strike certain portions of Plaintiff's Surreply Brief. For the reasons set forth below, the court **GRANTS** Columbia House's Motion for Summary Judgment, and **GRANTS** Columbia House's Motion to Strike Portions of Plaintiff's Surreply Brief.

I. Summary Judgment Standard

Disposition of a case on summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.56(c). The record and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *National Soffit & Escutcheons, Inc. v. Superior Sys., Inc.*, 98 F.3d 262, 264 (7th Cir. 1996).

The moving party bears the burden of demonstrating the absence of a triable issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden may be met by demonstrating "that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. If the moving party meets its burden, the adverse party "may not rest upon the mere allegations or denials of the adverse party's pleading," but must present specific facts to show that there is a genuine issue of material fact. Fed.R.Civ.P. 56(e); *see also National Soffit*, 98 F.3d at 265 (citing *Hughes v. Joliet Correctional Center*, 931 F.2d 425, 428 (7th Cir. 1991)).

II. Facts[1]

A. Columbia House and its Operations

1. Columbia House is in the business of, among other things, directly marketing various music products such as CDs and DVDs to the general public by way of its Music and Video Clubs. (First Deposition of Sandra Pruitt, Defendant's Ex. 1 at 35; Declaration of Jan Miller, Defendant's Ex. 2, ¶ 4).

2. Columbia House services its customers via mail service, the Internet and through direct contact with its customer service center. (Defendant's Ex. 2, ¶ 4).

1. CSR Positions

[1] Columbia House cited to its depositions, declarations, and other record evidence by source and exhibit number. Thereafter, all references are to the exhibit number. For simplicity's sake, the court will refer to both Columbia House's and Plaintiff's exhibits in like manner.

3. Columbia House employs Customer Service Representatives ("CSRs") who are organized into departments or teams to best serve its customers in a prompt, professional and courteous fashion. (Defendant's Ex. 2, ¶ 6).

4. Customer service for CML was designed to interact with Spanish-speaking customers about their musical interests. (Defendant's Ex. 2, ¶ 6).

5. Columbia House established a similar department for the Spanish video club. (Defendant's Ex. 2, ¶ 6).

6. Some, but not all, of the Spanish-speaking CSRs in the CML were of Hispanic origin. (Defendant's Ex. 2, ¶ 6; Defendant's Ex. 1 at 64, 78).

7. Columbia House also maintained similar customer service groups for English-speaking customers of both the music and video clubs. (Defendant's Ex. 2, ¶ 7).

8. Though employees in the English and Spanish customer service groups performed the same core tasks, they were organized separately and worked under different direct supervision. (Defendant's Ex. 2, ¶ 8).

a. The CSR Job Duties

9. Columbia House's CSRs performed typical customer service functions, including answering phones, handling customer e-mail, and generating correspondence to customers. (Defendant's Ex. 1 at 65-66, 80-81; Deposition of Beth Trueblood, Defendant's Ex. 3 at 21, 22; Deposition of Ana Ferreira-Martinez, Defendant's Ex. 4 at 23).

10. One unique aspect of customer service in the CML group was sending out pre-formatted letters for customers in Spanish. (Declaration of Ana Ferreira-Martinez, Defendant's Ex. 5, ¶ 4).

11. On occasion, the computerized templates for those letters did not adequately address a situation, so the CSR would translate an outgoing English letter "off-line" into Spanish. (Second Deposition of Sandra Pruitt, Defendant's Ex. 6 at 39-42; Defendant's Ex. 5, ¶ 4). Such off-line typing was thus another aspect of the CSR's job. (Defendant's Ex. 5, ¶ 4). In addition, apart from handling customer phone calls, some of the CSRs were trained to respond to customer e-mails. (Defendant's Ex. 5, ¶ 4).

b. Customer Service Expectations and Monitoring

12. CSRs are expected to be ready and available to take customer calls at all times (excluding breaks and meal periods) during their working hours. (Defendant's Ex. 2, ¶ 9).

13. To ensure that CSRs adequately handle their customer service responsibilities, Columbia House has established mechanisms for monitoring customer service calls. (Defendant's Ex. 2, ¶ 9). For example, each supervisor monitored from his or her desk whether the CSR had placed his or her phone on "Not Ready" for calls or "ACD" (activated) to take calls. (Defendant's Ex. 2, ¶ 9; Ex. 4, pp. 33, 56). If the phone was set to "Not Ready," no calls were routed to the individual CSR's phone. (Defendant's Ex. 2, ¶ 9). In addition, the supervisor could determine if the CSR's phone was on "ACD-Hold"; i.e., a call was connected but the CSR had placed the customer on hold. (Defendant's Ex. 2, ¶ 9). Finally, the supervisors listened in on customer calls to evaluate the CSRs' interactions with customers. (Defendant's Ex. 2, ¶ 9; Defendant's Ex. 4 at 28-29). The CSRs' phone activity was logged by Columbia House and, ultimately, used in the year-end or mid-year performance appraisal to evaluate the individual employees' efficiency and call availability. (Defendant's Ex. 2, ¶ 10; Defendant's Ex. 4 at 40-41). Thus, the CSR who spent more time with his or her phone on "ACD" as opposed to "Not Ready" received a

higher evaluation score. (Defendant's Ex. 2, ¶ 10; Defendant's Ex. 4 at 40-41).

14. The Quality Control Department also routinely monitored individual CSR calls in each department. (Defendant's Ex. 2, ¶ 11; Deposition of Mary M. Braden, Defendant's Ex. 7 at 58, 59). The Quality Control group conducted that monitoring of individual CSR calls on a random basis and also when specifically requested by a supervisor or department head. (Ex. 2, ¶ 11). The Quality Control department included approximately fifteen (15) different individuals who routinely listened in on CSR calls to gauge CSR interactions with customers and, more generally, CSR compliance with the various customer service standards. (Ex. 2, ¶ 11).

c. Columbia House's Standards For Handling Customer Calls

15. Columbia House takes its customer service standards very seriously. (Defendant's Ex. 2, ¶ 12). Columbia House implemented a detailed rule about when a customer call could be disconnected. (Ex. 2, ¶ 12, Decl. Ex. A).

16. Columbia House also expected its CSRs to be attentive and courteous in every respect and to avoid causing undue delay or confusion for the callers. (Ex. 2, ¶ 12). Thus, Columbia House discouraged its CSRs from placing customers on hold except to ask questions of a supervisor and, even then, only briefly. (Ex. 2, ¶ 12; Ex. 4, p. 47). CSRs specifically were instructed not to place customers on a false "hold" by way of a "quick disconnect"; i.e., by simply disconnecting their headsets. (Defendant's Ex. 2, ¶ 12; Defendant's Ex. 4 at 34-35). In the event of a "quick disconnect," the CSR and the customer could not hear one another and the caller was left with nothing but dead air until the head set was re-connected. (Defendant's Ex. 2, ¶ 12; Defendant's Ex. 4 at 34-35).

17. Violations of these standards could result in termination for the first offense. (Defendant's Ex. 2, ¶ 12; Defendant's Ex. 7 at 17-18, 64-65; Defendant's Ex. 3 at 55). In fact, in 2001 – the year of Plaintiff's termination – two English-speaking CSRs were terminated for disconnecting customers in violation of the Columbia House disconnect policy. (Defendant's Ex. 2, ¶ 13).

18. Moreover, several employees in the Spanish-speaking CSR groups were given Final Warnings in 2001 for other misconduct related to customer service issues. (Defendant's Ex. 2, ¶ 14; Defendant's Ex. 4 at 32). For example, Alan Barbour ("Barbour") – a non-Hispanic individual working in CML – received a Final Warning in August 2001 for failing to remain at his workstation to take customer calls. (Defendant's Ex. 2, ¶ 14). In addition, Peggy Gallegos ("Gallegos") – another non-Hispanic individual working in CML – received a Final Warning in 2001 for reading non-work related materials at her desk while she was on duty. Both Final Warnings were issued by supervisor Beth Trueblood

(" Trueblood"). (Defendant's Ex. 2, ¶ 14).

2. The CML CSR Position at Columbia House

19. In 2001, the CML group included approximately twenty (20) CSRs. (Defendant's Ex. 1 at 75; Defendant's Ex. 3 at 14). During the relevant time period, and prior to March 2001, Wanda Norman ("Norman") supervised the CML department. (Defendant's Ex. 1 at 69, 84, 87; Deposition of Wanda Norman, Defendant's Ex. 8 at 7, 8). However, after a reorganization in March 2001, Trueblood became the supervisor in CML for day shift. (Defendant's Ex. 1 at 84, 87; Defendant's Ex. 3 at 11, 13, 16-17; Defendant's Ex. 8 at 8-10). Trueblood, in turn, reported to manager Donna Gibbons ("Gibbons"). (Defendant's

Ex. 3 at 13; Declaration of Donna Gibbons, Defendant's Ex. 9, ¶ 4). Ms. Gibbons reported to director Stephanie Peterson ("Peterson"). (Defendant's Ex. 9, ¶ 15). Ana Ferriera-Martinez ("Martinez") was the evening shift supervisor in CML and her hours overlapped those of Ms. Trueblood and of Plaintiff by a few hours. (Defendant's Ex. 4 at 12-15). Martinez also served as a back-up supervisor when Trueblood was absent or on vacation. (Defendant's Ex. 4 at 35; Defendant's Ex. 3 at 57).

20. As supervisors of CML, Trueblood's and Martinez's duties included monitoring employee attendance and customer service phone calls, issuing discipline when necessary, resolving co-worker issues as they arose, ensuring appropriate shift coverage for CML, answering employee questions about policies relating to customer mail and phone calls, tracking how much mail was received and processed, and confirming that the various group functions such as "off-line typing" were done at an acceptable rate. (Defendant's Ex. 3 at 15, 16, 43; Defendant's Ex. 4 at 12-13). Both Trueblood and Martinez speak Spanish as well as English. (Defendant's Ex. 3 at 18-19; Defendant's Ex. 4 at 16).

3. Columbia House's Anti-Discrimination Policies and Human Resources Department

21. Columbia House has a written policy which provides that Columbia House provides equal employment to all of its employees, without regard to national origin, race, sex, etc. (Defendant's Ex. 2, ¶ 15 and Ex. C attached thereto).

22. This policy, as well as Columbia House's training literature, is written solely in English. (Deposition of Maggie Braden, Plaintiff's Ex. 4 at 21-22).

23. Columbia House has an on-site Employee Relations Manager named Maggie Braden

("Braden"). Braden handled the first-level human resources functions relating to the Customer Service Representatives, including those in CML. (Deposition of Mary M. Braden, Defendant's Ex. 7 at 10-12). Braden's duties as Employee Relations Manager included dealing with discipline and other human resource-related matters for hourly or non-exempt employees. (Defendant's Ex. 7 at 11-12). Typically, Braden became involved in a disciplinary situation only after a supervisor brought an issue to her attention. (Defendant's Ex. 7 at 14, 16-17). Accordingly, Braden usually did not initiate discipline or make termination decisions, but instead offered input from a human resources perspective and sought to ensure that disciplinary matters were handled appropriately. (Defendant's Ex. 7 at 16-17).

4. Columbia House's FMLA Policy and Administration Procedure

24. Columbia House's FMLA policy is published in its Employee Handbook. The policy provides for up to 12 weeks of unpaid leave. The policy requires employees, among other things, to provide a completed health care provider certification form to support a request for leave for a serious health condition. (Defendant's Ex. 2, ¶ 16 and Ex. D attached thereto).

25. If the employee fails to provide information necessary to determine that leave is qualifying, the company proceeds with the understanding that the leave is not qualifying and the absence is considered unexcused under its attendance policy. (Defendant's Ex. 2, ¶ 16).

26. The Columbia House Medical Department handles all FMLA administration and determines whether absences are covered by the FMLA. (Defendant's Ex. 7 at 47-48; Defendant's Ex. 2, ¶ 17).

27. Jan Miller, Director of Compensation and Benefits, is responsible for overseeing the FMLA administration process and makes the final determination with regard to whether a particular absence meets the requisite criteria for FMLA leave. (Defendant's Ex. 2, ¶ 17).

B. Plaintiff

28. Plaintiff, a native of Mexico, worked for Columbia House from March 3, 1997 to August 6, 2001, as a Spanish-speaking CSR in CML. (Defendant's Ex. 1 at 9, 45, 63, 65).

1. Plaintiff's FMLA Leaves

29. Plaintiff requested and Columbia House granted FMLA leave on multiple occasions during Plaintiff's employment. (Defendant's Ex. 1 at 98, 101-02; Defendant's Ex. 2, ¶ 20). For example, Plaintiff notified Columbia House of her need for FMLA leave and provided the requisite information verifying a qualifying reason for leave on the following dates: June 22, 1999 until September 13, 1999; March 8, 2000 until April 13, 2000; October 18, 20, and 26, 2000; November 28, 2000; December 5 and 7, 2000; December 18 and 20, 2000; January 2, 2001; January 30, 2001; and February 2 until March 11, 2001. (Defendant's Ex. 1 at 104; Defendant's Ex. 2, ¶ 20 and Ex. E attached thereto).

30. Plaintiff failed to notify Columbia House of a qualifying reason for leave and/or failed to timely provide the requisite documentation to verify that the absence was due to a qualifying reason on the following occasions: December 8, 2000; January 3, 2001; and January 15, 16, and 18, 2001. (Defendant's Ex. 2, ¶ 21 and Ex. F attached thereto).

31. As a result, the Medical Department denied FMLA leave for those dates and Plaintiff consequently received 2.5 occurrences under Columbia House's attendance policy.

(Defendant's Ex. 3 at 26-27; Defendant's Ex. 2, ¶ 21 and Ex. G attached thereto).

32. Plaintiff did not receive any form of written or verbal counseling because of the occurrences and her employment was never in jeopardy as a result of the occurrences for the non-qualifying absences. (Defendant's Ex. 6 at 95; Defendant's Ex. 3 at 94).

33. Upon her return from her FMLA leave in March 2001, Plaintiff reviewed the 2.5 occurrences on her attendance record and concluded that they should be removed. (Defendant's Ex. 6 at 93-95).

34. Shortly after Plaintiff returned from leave on March 11, 2001, Plaintiff raised the issue with Trueblood (her new supervisor) and then with Norman (her former supervisor). (Defendant's Ex. 6 at 95-98; Defendant's Ex. 3 at 18, 23-25, 31-32).

35. Trueblood looked for a way to help Plaintiff. (Defendant's Ex. 3 at 31-33).

36. Ultimately, on April 9, 2001, the particular occurrences were eliminated from her record; thereafter, her record contained no occurrences. (Deposition of Beth Trueblood, Plaintiff's Ex. 1 at 24-35).

2. Ms. Martinez's E-Mail Messages to Trueblood

37. During this time frame, Plaintiff alleges that Martinez sent e-mails to Trueblood which reveal that Martinez was upset that Columbia House removed the occurrences from Plaintiff's record. (Plaintiff's Exs. 12, 13). The content of these e-mails is discussed in Section III.A.1. and in notes 3 and 4.

38. Columbia House denies Plaintiff's characterization of the e-mails. (Defendant's Ex. 14; Declaration of Wanda Norman, Defendant's Ex. 15, ¶ 4).

3. Plaintiff's Workplace Incidents

a. January 2001 Comment

39. In January 2000, one of Plaintiff's co-workers – who was pregnant at the time – complained that Plaintiff told her she was "fat." (Declaration of Mary M. Braden, Defendant's Ex. 10, ¶ 10).

40. Braden spoke with Plaintiff and advised her to be more careful with her choice of words. (Defendant's Ex. 1 at 122 and Ex. 15 attached thereto; Defendant's Ex. 7 at 11, 12, 111, 112; Defendant's Ex. 10, ¶ 4).

b. April 2001 Final Conduct Warning

41. On March 29, 2001, Martinez testified that she observed Plaintiff chatting with co-workers while her phone was switched to "Not Ready" for calls and, later that day, further observed Plaintiff use a "quick disconnect" on the phone – which resulted in dead air for the customer – so she could talk to another co-worker. (Defendant's Ex. 4 at 34-35; Defendant's Ex. 3 at 17; Defendant's Ex. 1, Dep. Ex. 16).

42. Martinez documented the event and reported the issue to Trueblood. (Defendant's Ex. 5, ¶ 6; Defendant's Ex. 3 at 56; Defendant's Ex. 1, Dep. Ex. 16).

43. Trueblood consulted with Braden about the appropriate discipline for Plaintiff. (Defendant's Ex. 3 at 44-45).

44. On April 10, 2001, Plaintiff advised Trueblood that she had spoken with an attorney regarding the conduct issue. (Plaintiff's Dep. Ex. 16, attached to Ex. 4).

45. On April 12, 2001, Plaintiff was issued a Final Warning,[2] but refused to sign it. (Defendant's Ex. 1 at 124-25, and Dep. Ex. 16).

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[2] About two weeks lapsed between Martinez's documentation of the underlying event and the issuance of the Final Warning because management typically needed time to assess the appropriate discipline – especially in CML where it was difficult to find additional Spanish-speaking CSRs. (Defendant's Ex. 4 at 31-32).

46. The Final Warning notes that Quality Control was also monitoring on that same day, reported that Plaintiff again failed to follow proper procedures and asked customers to hold so she could engage in personal conversation with her co-workers. (Defendant's Ex. 3 at 51-52; Ex. 1, Dep. Ex. 16).

47. However, Quality Control officer Brandy Miller ("Miller") testified that Martinez asked her to listen in on Plaintiff's phone calls around this specific time frame, and does not remember ever making a report regarding the impropriety of Plaintiff's phone calls. (Deposition of Brandy Miller, Plaintiff's Ex. 5 at 24-26).

c. Plaintiff's Mid-Year Performance Evaluation

48. On June 19, 2001, Plaintiff received an "exceptional" mid-year performance appraisal. In fact, Plaintiff received the highest possible score in all categories. (Defendant's Ex. 3 at 51; Defendant's Ex. 1, Dep. Ex. 14).

49. In the Supervisor Comments Section, the evaluation stated, "You are doing wonderful! Thank you for your hard work!" (Defendant's Ex. 1, Dep. Ex. 14).

50. After Plaintiff signed the evaluation, Trueblood gave the evaluation to Gibbons for her review. (Defendant's Ex. 6 at 10-12; Defendant's Ex. 9, ¶ 6).

51. Due to the Final Warning for conduct which was separately referenced in Plaintiff's evaluation, Gibbons instructed Trueblood – who had been supervising Plaintiff for approximately three months – to include warning language to Plaintiff. (Defendant's Ex. 9, ¶ 6). Plaintiff's evaluation was therefore altered to reflect a three-point reduction in her overall score. In addition, the following comment was added to Supervisor Comments Section in brackets, "Continue to improve your conduct. I know you can do it!" (Defendant's Ex. 1, Dep. Ex. 14).

d. The Fire Drill/First Bridwell Incident

52. In July 2001, Plaintiff alleges that the Spanish-speaking CSRs in CML were misdirected by Amy Bridwell ("Bridwell"), a supervisor in the English-language CSR group. (Defendant's Ex. 6 at 24-25).

53. There is a fire evacuation plan for Columbia House in which various groups are assigned a primary exit based on proximity and the efficient flow of employees. (Defendant's Ex. 2, ¶ 25).

54. The exit assigned to various working groups changed from time to time if their work stations were relocated. (Defendant's Ex. 2, ¶ 25; Defendant's Ex. 6 at 25-26).

55. When Bridwell began to move to her assigned exit for that fire drill on the day in question, she recognized that a bottleneck had inappropriately developed at one of the exits. (Defendant's Ex. 11 at 24).

56. Bridwell believed that too many people were trying to exit by the wrong door as set forth in Columbia House's fire evacuation plan. (Defendant's Ex. 11 at 24). To alleviate that crowding, Bridwell allegedly addressed the entire group – consisting of both Hispanic and non-Hispanic employees – by stating, "You people don't come through this door." (Defendant's Ex. 6 at 24, 26; Defendant's Ex. 11 at 24; Defendant's Ex. 4 at 50).

57. Plaintiff alleges that Bridwell also laughed and stated that the door was "for the administrators." (Defendant's Ex. 6 at 26).

58. Plaintiff alleges that several of her Hispanic co-workers, including Marta Jimenez ("Jiminez"), Emma Carballo ("Carballo"), and Marco Valdez ("Valdez") complained to Trueblood about Bridwell's comment. (Defendant's Ex. 6 at 26-28).

59. The employees indicated that they were upset that Bridwell told them to use a different

door. (Defendant's Ex. 3 at 58-60, 62-63; Defendant's Ex. 4 at 50-51).

60. Trueblood did not understand from the employees who complained that there was any concern about discrimination directed at a certain subclass of employees. (Defendant's Ex. 3 at 58-60). Trueblood spoke with Bridwell about the appropriate fire exit procedure. (Defendant's Ex. 3 at 59, 60).

61. Bridwell was not disciplined for her comment. (Deposition of Amy Bridwell, Plaintiff's Ex. 6 at 22-23).

e. Second Incident With Bridwell

62. On July 19, 2001, Plaintiff had an altercation with Bridwell. (Defendant's Ex. 1 at 130-31; Deposition of Amy Bridwell, Defendant's Ex. 11 at 8-9, 29-31).

63. On that day, Plaintiff observed Bridwell writing information about mandatory overtime for the upcoming weekend on a blackboard near Plaintiff's work station. (Defendant's Ex. 1 at 130-31; Defendant's Ex. 11 at 30-31).

64. Plaintiff had previously requested a vacation day for Saturday, July 21, and Trueblood had granted her request. (Defendant's Ex. 1 at 131; Defendant's Ex. 3 at 66). Plaintiff nonetheless approached Bridwell and indicated that she could not work mandatory overtime on Saturday. (Defendant's Ex. 1 at 130-31; Defendant's Ex. 11 at 30-31).

65. Plaintiff continued to press the issue, Bridwell grew irritated, and the two exchanged words. (Defendant's Ex. 1 at 131-32; Defendant's Ex. 11 at 30-31, 35-36).

66. Plaintiff alleges that in the course of the altercation, Bridwell was rude and arrogant and raised her voice. (Defendant's Ex. 1 at 131-33).

67. Plaintiff further alleges that Bridwell made a comment to the effect that "if everybody put your ass to work, you can do it, too." (Defendant's Ex. 1 at 132-33). Bridwell made

no reference to Plaintiff's national origin. (Defendant's Ex. 1 at 132-34). The conversation/altercation lasted only a few minutes. (Defendant's Ex. 1 at 133).

68. According to Plaintiff, immediately after the altercation she encountered a co-worker and indicated that she was upset and that she wanted to see someone from human resources. (Defendant's Ex. 1 at 132-33, 137-138). The co-worker directed her to Cindy Morgan. (Defendant's Ex. 1 at 138-39).

69. Because Plaintiff claims she had difficulty speaking in English, Morgan called Norman, Plaintiff's former supervisor. (Defendant's Ex. 1 at 139).

70. When Norman arrived, Plaintiff told her that Bridwell had yelled at her. (Defendant's Ex. 1 at 139). Plaintiff also requested to speak with human resources because she believed Bridwell's demeanor was inappropriate. (Defendant's Ex. 1 at 139-40).

71. Plaintiff then spoke with Braden and told her that Bridwell had been rude to her. (Defendant's Ex. 1 at 140-41; Defendant's Ex. 7 at 94-95; Defendant's Ex. 10, ¶ 5).

72. Plaintiff made no mention of discrimination in her conversation with Braden. (Defendant's Ex. 1 at 140-41; Defendant's Ex. 10, ¶ 5).

73. Bridwell's supervisor, Gibbons, ultimately counseled Bridwell on patient and productive communications, but did not issue any formal discipline. (Defendant's Ex. 9, ¶ 8).

74. Martinez, the back-up supervisor for CML, advised Trueblood by e-mail dated July 21, 2001, of the events she missed while on vacation. (Defendant's Ex. 3 at 96, Dep. Ex. 19; Defendant's Ex. 4 at 44).

75. That e-mail message indicated that Plaintiff had instigated the confrontation with Bridwell and that Bridwell had not yelled during their conversation. (Defendant's Ex. 3, Dep. Ex. 19). Martinez further indicated that there were other issues relating to

Plaintiff's behavior that warranted further discussion. (Defendant's Ex. 3 at 68, Dep. Ex. 19).

76. At any rate, Plaintiff did take her vacation day on July 21 and was not required to work mandatory overtime. (Defendant's Ex. 1 at 141-42).

f. Incident With Amy Phillips

77. One of the "other issues" alluded to in Martinez's July 21 e-mail above is Plaintiff's incident with Amy Phillips ("Phillips") – a CSR under Martinez's supervision.

78. Plaintiff believed that Phillips had been discarding customer e-mails from Spanish-speaking customers. (Plaintiff's Ex. 4 at 52-62).

79. Plaintiff approached Phillips and told her what she suspected. Phillips became very upset and started screaming at Plaintiff. (Plaintiff's Ex. 4 at 54).

g. Other Incidents With Co-Workers

80. Some of Plaintiff's peers outside CML complained about Plaintiff bothering them with questions and being too loud. (Defendant's Ex. 3, Dep. Ex. 19).

81. Martinez and Trueblood were also aware of other employees in CML complaining about demeaning comments from Plaintiff. For example, Trueblood knew that Plaintiff had made multiple disparaging remarks about the Spanish used by co-workers from other countries, e.g., Venezuela. (Defendant's Ex. 5, ¶ 7).

h. Meetings With Plaintiff

82. Braden and Trueblood met with Plaintiff on several occasions during the final weeks of her employment to discuss her issues with co-workers.

83. On July 25, 2001, Braden and Trueblood met with Plaintiff to address the situations with Bridwell and Phillips. (Defendant's Ex. 6 at 16, 46-47, Dep. Exs. 19, 20).

84. During these conversations in July 2001, Trueblood understood that Plaintiff was upset by the Bridwell situation because she thought Bridwell had yelled at her in front of the group and because she believed Bridwell gave her conflicting information about whether she had to work mandatory overtime. (Defendant's Ex. 3 at 67-68, Dep. Ex. 19).

85. Braden and Trueblood spoke with Plaintiff on July 26, 2001, regarding another dispute between Plaintiff and Phillips. (Defendant's Ex. 6 at 46, 49-50, 56-61; Defendant's Ex. 3 at 76,77, Dep. Ex. 21).

86. At that time, Trueblood and Braden instructed Plaintiff not to confront her co-workers. They also told her that if a co-worker lashed out at her, she should not reciprocate the behavior. (Defendant's Ex. 6 at 56-57; Defendant's Ex. 3 at 77, Dep. Ex. 21).

87. Plaintiff was not issued any formal discipline as a result of that occurrence. (Plaintiff's Ex. 4 at 56-57; Defendant's Ex. 3 at 96-98, Dep. Exs. 19, 22, 23).

88. Trueblood also referred the issue as it related to Phillips to her supervisor, Martinez, to address. (Defendant's Ex. 3 at 75, 76, 78-79, 85, 96; Defendant's Ex. 4 at 51-54).

89. Martinez ultimately counseled Phillips about the issue, but did not issue any formal discipline. (Defendant's Ex. 4 at 54-55).

i. Plaintiff's Termination

90. On August 4, 2001, Alba Alvarez ("Alvarez"), a Hispanic co-worker, complained to Trueblood that Plaintiff was rudely correcting her work. (Defendant's Ex. 3 at 87-88, Dep. Ex. 23; Defendant's Ex. 10, ¶ 6).

91. Alvarez also reported that Plaintiff had made disparaging remarks about Phillips after Plaintiff listened to a phone conversation Phillips had with a customer. (Defendant's Ex. 3, Dep. Ex. 23).

92. Trueblood informed Braden and her manager, Gibbons, of this misconduct. (Defendant's Ex. 3 at 84, 89; Defendant's Ex. 10, ¶¶ 6, 7; Defendant's Ex. 9, ¶ 9).

93. Trueblood and Braden concluded based on the circumstances that termination was appropriate. (Defendant's Ex. 1 at 156-57; Defendant's Ex. 3 at 89-90, Dep. Ex. 23; Declaration of Mary M. Braden, Defendant's Ex. 10, ¶ 7).

94. Gibbons agreed. (Defendant's Ex. 9, ¶ 9; Defendant's Ex. 7 at 103-04).

95. Accordingly, Gibbons sought the approval of Director Peterson, and ultimately, Vice President Charles Jackson. (Defendant's Ex. 9, ¶ 10).

96. All agreed that termination was appropriate. (Defendant's Ex. 9, ¶ 10).

97. Braden and Trueblood met with Plaintiff on August 6, 2001, to notify Plaintiff of the decision. (Defendant's Ex. 1 at 158-59; Defendant's Ex. 7 at 106-07).

III. Discussion

A. FMLA Retaliation

Plaintiff alleges that Columbia House violated the FMLA, 29 U.S.C. § 2615(a)(2), by terminating her employment in retaliation for her alleged exercise of rights under the FMLA.

1. Direct Method

Under the direct method, Plaintiff must produce evidence to show that the decisionmaker – the person responsible for the contested decision – had a retaliatory intent. *Rogers v. City of Chicago*, 320 F.3d 748, 754 (7th Cir. 2003). One means of establishing retaliatory intent under this method is through direct evidence. *Id*. Direct evidence "usually requires an admission by the [decisionmaker] that his actions were based on [the protected status]", i.e., FMLA leave. *See Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 321 (7th Cir. 2002); *Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640, 644 (7th Cir. 2002), *cert. denied*,

537 U.S. 879 (2002) (holding that direct evidence is limited to "evidence that establishes [retaliation] without resort to inferences from circumstantial evidence"). Plaintiff may also establish retaliation under the direct method with circumstantial evidence – i.e., "evidence that allows a jury to infer intentional discrimination by the decisionmaker." *Id*. Under the direct method, circumstantial evidence must establish more than pretext; it "must itself show that the decisionmaker acted because of the prohibited animus." *Venturelli v. Arc Community Serv., Inc.*, 350 F.3d 592, 601 (7th Cir. 2003).

Plaintiff alleges she has direct evidence of discrimination based upon two e-mail messages sent by Norman, Plaintiff's former supervisor, to Martinez, in late March 2001, which she refers to as the "crack down" e-mails. (*See* Finding of Fact #37). In the March 26, 2001 e-mail,[3] Plaintiff asserts that Martinez expressed "peevishness" due to the fact that Plaintiff was successful in her efforts to get the occurrences removed from her record. In fact, Martinez reported concerns about Plaintiff's efforts to seek special treatment on a separate issue. Two contemporaneous e-mails from Martinez to Trueblood reveal Plaintiff's efforts to secure a more favorable shift assignment despite her lack of seniority by mistakenly comparing herself to part-time workers. (*See* Defendant's Ex. 14).

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[3] On March 26, 2001, Martinez e-mailed Trueblood the following message:

> Wanda [Norman] mentioned that she is the only one that complains every year at realignment about the part-timers. Anyway, Wanda also said that b/c she got her way with the occurrences she is going to try now with this. I wanted to let you know what was said. Thanks.

(Plaintiff's Ex. 12).

In the March 30, 2001 e-mail,[4] Norman explained that she occasionally needed to assign CSRs to special jobs such as callbacks. (Defendant's Ex. 15, ¶ 4). Because such jobs took CSRs away from their regular duties of answering incoming calls, the special jobs had to be completed quickly and efficiently. (Defendant's Ex. 15, ¶ 4). Therefore, Norman limited those calls to the most experienced and senior representatives, including Carballo and Maria Lauby. (Defendant's Ex. 15, ¶ 4). In March 2001, after she no longer supervised the CML group, Norman learned that a few of her former reports had become disgruntled about the assignment of such projects. (Defendant's Ex. 15, ¶ 5). Thus, this e-mail arose out of Plaintiff's effort to obtain a special job.

Plaintiff also asserts that the time between the removal of the occurrences (April 2001) and the time she was terminated (August 2001) is evidence of retaliation. The problem with her argument is that the protected activity at issue is her use of FMLA leave, not her post-leave protests. *King v. Preferred Technical Group*, 166 F.3d 887, 893 (7th Cir. 1999). Indeed, Plaintiff did not seek the removal of the properly assessed occurrences under the FMLA; rather, she sought their removal under Columbia House's attendance policy. But even under her view of the relevant law, roughly four months lapsed between the time the occurrences were removed

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[4] On March 29, 2001, Martinez e-mailed Trueblood the following message:

> Wanda also stated that she had taken Sandra off of doing callbacks and that Emma and Maria normally do them unless they get very backed up then Marcos and Sandra do them. I am going to place the callbacks in Emma and Maria's mailboxes. I do not want to assign Sandra or Marcos to any special jobs. Wanda also stated that they never behaved like this so I really think that they want to see how much they want to get away with. I am tired. I want to crack down now and not have it snowball and get impossible later. Thanks.

(Plaintiff's Ex. 13).

and her termination. This time frame is insufficient to support a claim for retaliation. *See, e.g., Lewis v. Holsum of Fort Wayne, Inc.*, 278 F.3d 706, 711 (7th Cir. 2000) (three month period too long to support inference of retaliation); *Filipovic v. K & R Express Sys., Inc.*, 176 F.3d 390, 399 (7th Cir. 1999) (four months negates causal inference); *Hughes v. Derwinski*, 967 F.2d 1168, 1175 (7th Cir. 1992) (same).

Plaintiff further asserts that she and another employee, Valdes, were singled out for retaliatory treatment. Plaintiff and Valdes, however, were not similarly situated. The record reflects that Valdes filed an EEOC charge of discrimination in September of 2000, more than six months before the alleged "crack down." (Affidavit of Marco A. Valdes, Plaintiff's Ex. 8, ¶ 5, and Ex. A). Valdes' charge of discrimination did not assert rights under the FMLA, and he remains employed by Columbia House to this day. (Plaintiff's Ex. 8, ¶ 2, and Ex. A).

Finally, Plaintiff's asserts that Trueblood and Martinez were scheming to terminate Plaintiff's employment. This assertion is also unsupported by the record evidence. Trueblood repeatedly counseled Plaintiff following the various incidents she had with her co-workers. Further, Martinez was not Plaintiff's immediate supervisor and did not exercise any formal disciplinary authority over her. (Defendant's Ex. 5, ¶¶ 6-7; Defendant's Ex. 3 at 78-79, 98).

The court finds that Plaintiff has not proffered evidence which independently proves that the decisionmakers terminated Plaintiff because she exercised her rights under the FMLA. Therefore, her claim fails under the direct method of analysis.

2. Indirect Method

Because her claim fails under the direct method, Plaintiff must proceed under the *McDonnell Douglas* burden-shifting analysis. Under that analysis, Plaintiff must first establish a prima facie case of retaliation, which requires her to show that (1) she engaged in statutorily

protected activity; (2) she performed her job according to Columbia House's legitimate expectations; (3) despite meeting these expectations, she suffered a materially adverse employment action; and (4) she was treated less favorably than similarly-situated employees who did not engage in statutorily protected activity. *Haywood v. Lucent Tech., Inc.*, 323 F.3d 524, 531 (7th Cir. 2003); *Rogers*, 320 F.3d at 754-55; *Stone*, 281 F.3d at 644. The failure to prove any essential element of the prima facie case is fatal to Plaintiff's case. *Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 465 (7th Cir. 2002). If Plaintiff establishes her prima facie case, the burden shifts to Columbia House to offer a legitimate, nondiscriminatory reason for the adverse employment action. *Id*. If Columbia House does so, the burden of production then shifts back to the Plaintiff to show the employer's proffered reason is pretextual. *Id*.

a. Plaintiff's Prima Facie Case

Columbia House argues that Plaintiff cannot establish the second and fourth elements of her prima facie case – i.e., that she was performing her job in a satisfactory manner or that similarly situated co-workers who did not engage in protected activity (exercising rights under the FMLA), were treated more favorably.

1. Legitimate Expectations

Plaintiff contends that her favorable performance review in June 2001 shows that she was performing to her employer's legitimate expectations. The critical issue, however, is not whether her performance was satisfactory at some point in time during her employment; rather, it is whether her performance was satisfactory at the time of her termination. *Hong v. Children's Mem'l Hosp.*, 993 F.2d 1257, 1262 (7th Cir. 1993) ("[Plaintiff] cannot satisfy the [legitimate expectations] requirement by showing that her performance was adequate for some period of time during her employment. . . The critical issue is whether she was performing well in her job

at the time of her termination."). The record reflects that Plaintiff received a Final Warning in April of 2001 for mishandling customer phone calls. The record also reflects that between the time of Plaintiff's performance review and her termination, Plaintiff had conflicts with her co-workers over various workplace issues. Despite warnings by Trueblood and Braden to refrain from such behavior, Plaintiff continued to clash with her co-workers. The court therefore finds that Plaintiff was not performing her job to Columbia House's legitimate expectations at the time of her termination.

2. Similarly Situated Employees

In order to meet this element of her prima facie case, Plaintiff must identify a similarly situated co-worker who is "directly comparable to [Plaintiff] in all material respects." *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002). "This normally entails a showing that the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 618 (7th Cir. 2000). In this context, Plaintiff "need not show complete identity in comparing [her]self with the better treated employee, but [s]he must show substantial similarity." *Id.*

Plaintiff contends that two non-Hispanic co-workers in CML, Barbour and Gallegos, were, like her, issued a Final Warning for customer care issues, but their employment was not ultimately terminated. However, there is no evidence in the record to show that these employees were the subject of co-worker complaints about their rude and inappropriate behavior, nor evidence that they ever failed to heed their supervisor's instructions to avoid confronting co-workers. The court therefore finds that these co-workers were not similarly situated to Plaintiff

in all material respects. Plaintiff's prima facie case fails as a matter of law.

b. Pretext

Even if Plaintiff could meet her prima facie case, her FMLA claim still fails as a matter of law. To establish pretext, Plaintiff must demonstrate that "[Columbia House's] proffered reason for her termination is a lie or completely lacks a factual basis." *Jordan v. Summers*, 205 F.3d 337, 343 (7th Cir. 2000). "Even if Columbia House's reasons for terminating Plaintiff's employment were mistaken, ill considered, or foolish, so long as [Columbia House] honestly believed those reasons, pretext has not been shown." *Id.*

Columbia House's legitimate, nondiscriminatory reason for terminating Plaintiff's employment is that Plaintiff, while working under a Final Warning, created discord in the office by criticizing co-workers, challenging their language skills, and their work product despite repeated warnings to take such issues to her supervisor. The last of the co-worker complaints occurred on August 4, 2001, just a week after she was counseled by Braden and Trueblood.

In an attempt to show that Columbia House's reason for terminating Plaintiff was based upon her complaints relating to her FMLA leave, Plaintiff points to the March 2001 "crack down" e-mails, and argues that these show a concerted plan to "go after her." For the reasons articulated in Section III.A.1. of this opinion, the court rejects Plaintiff's conspiracy theory. *See also Murray v. Chicago Transit Auth.*, 252 F.3d 880, 888 (7th Cir. 2001) (holding that the Seventh Circuit "typically has been skeptical of such elaborate plot theories" and affirming grant of summary judgment on Title VII claim).

Plaintiff also flatly denies engaging in any wrongdoing. Such self-serving statements are insufficient to create a genuine issue of material fact. *See Pugh v. City of Attica*, 259 F.3d 619, 627 (7th Cir. 2001) (holding that it is insufficient for a plaintiff simply to assert that she did not

engage in misconduct and that the employer's belief was mistaken without offering further evidentiary support). Accordingly, Plaintiff's FMLA retaliation claim fails as a matter of law.

B. Retaliatory Discharge Claim

Plaintiff concedes she does not have direct evidence in support of her Title VII retaliatory discharge claim. The court will therefore proceed with the indirect method of proof. The prima facie elements listed in the above section apply. Columbia House argues that Plaintiff cannot establish a prima facie case of retaliatory discharge under Title VII because (1) she did not engage in protected activity, (2) she did not meet her employer's legitimate employment expectations, and (3) no similarly situated employees were treated more favorably.

1. Prima Facie Case

a. Protected Activity

To establish that she engaged in protected activity, Plaintiff must show that her alleged communications were sufficient to put Columbia House on notice that she believed she suffered objectionable conduct "because of" her national origin. *See Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1066 (7th Cir. 2003).

Plaintiff's evidence of protected activity relates to the fire drill incident in which Bridwell referred to Plaintiff and her co-workers as "you people" when telling them to use another exit door. Plaintiff alleges that a Hispanic co-worker, Jiminez, made the complaint about Bridwell to Trueblood. Plaintiff, Valdes, and Carballo were there to corroborate her concern. (Plaintiff's Ex. 4 at 24-28). However, Trueblood did not interpret Jiminez's complaint as raising a discrimination complaint. (Defendant's Ex. 3 at 58-60).

Plaintiff also cites to an incident relating to mandatory overtime in which she and Bridwell had a brief but heated exchange. Following that incident, Plaintiff made a complaint to

Braden that Bridwell had been rude to her. [Defendant's Ex. 1 at 140-41; Defendant's Ex. 7 at 94-95; Defendant's Ex. 10, ¶ 5). At no time did Plaintiff report to Braden that she felt she had been discriminated against on the basis of her national origin. (Defendant's Ex. 1 at 139-41; Defendant's Ex. 10, ¶ 5). Accordingly, Braden did not infer from any of Plaintiff's comments that Plaintiff was suggesting that she had been discriminated against based on her national origin, or, for that matter, any protected category. (Defendant's Ex. 10, ¶ 5).

b. Legitimate Expectations

As set forth in Section III.A.2.a.1., the court finds Plaintiff was not meeting Columbia House's legitimate expectations.

c. Similarly Situated

Plaintiff alleges that Bridwell and Phillips are similarly situated employees who were treated more favorably than she because they were not disciplined following their respective altercations with Plaintiff. Bridwell and Phillips are not similarly situated to Plaintiff. Bridwell was a supervisor in the English-language CSR group. Further, the record reflects that Bridwell and Plaintiff were not comparable in any other material respect: Bridwell had a different supervisor, Bridwell was never operating under a Final Warning, and Bridwell was not the subject of employee complaints. Finally, and significantly, Plaintiff was not treated differently than Bridwell with respect to that altercation. Indeed, Plaintiff and Bridwell were both informally counseled on appropriate workplace interactions. (Defendant's Ex. 9, ¶ 8; Defendant's Ex. 6 at 13-14, Dep. Exs. 19, 20).

Phillips, like Plaintiff, was a CSR. However, she reported to Martinez, not Trueblood. (Defendant's Ex. 3 at 75, 76, 78-79, 85, 96; Defendant's Ex. 4 at 51-55). Moreover, Plaintiff and Phillips are not similarly situated with respect to their conduct. Phillips was not operating

under a Final Warning and was not the subject of co-worker complaints. Finally, Phillips did not receive more favorable treatment. Plaintiff and Phillips were counseled by their respective supervisors with respect to that altercation as to appropriate workplace conduct. (Defendant's Ex. 4 at 54-55).

For these reasons, the court finds Plaintiff failed to establish a prima facie case of retaliatory discharge.

2. Pretext

Even if Plaintiff were able to establish a prima facie case of Title VII retaliation, her claim would still fail because she cannot rebut Columbia House's legitimate, non-discriminatory explanation for her termination, which has already been discussed in detail above.

In support of her pretext argument, Plaintiff points to her favorable mid-year performance review and her denial that she engaged in any misconduct. Plaintiff's job review, however, predates many of the incidents which formed the basis of Plaintiff's termination. *Hong v. Children's Mem'l Hosp*., 993 F.2d at 1262. Plaintiff's denial that she engaged in misconduct is insufficient to meet her burden on pretext. *See Pugh*, 259 F.3d at 627.

Plaintiff's final argument in support of pretext relates again to her performance review. Plaintiff contends that the fact that her review was altered is evidence of retaliatory motive. The evidence reflects that the review was altered at the direction of Trueblood's supervisor, Gibbons. Further, the review was altered to reflect the fact that Plaintiff had a Final Warning, which was already noted on the review itself.

C. Disparate Treatment Claim

1. Direct Evidence

Plaintiff alleges that she has direct evidence of national origin discrimination under Title

VII. This direct evidence consists of: (1) Bridwell's "you people" comment; (2) Valdes' statement that a Columbia House manager refused to give American flags to Hispanic employees because those employees are "not Americans"; and (3) Braden's testimony that Columbia House does not provide its personnel or training manuals in Spanish.

Bridwell's "you people" comment is not direct evidence of discrimination. This comment does not reveal any discriminatory animus, and even if it did, it was not made by a decisionmaker. *Balderston v. Fairbanks Morse Engine*, 328 F.3d 309, 321 (7th Cir. 2003).

Plaintiff's second piece of direct evidence – Valdes' statement that a manager said that Hispanics are "not Americans" – is inadmissible hearsay. Moreover, the alleged comment post-dates Plaintiff's termination and is not tied to any adverse employment action taken against her. Finally, it was not uttered by any of the decisionmakers involved in Plaintiff's termination.

Plaintiff's third piece of direct evidence – that Columbia House's manuals were not communicated or otherwise written in Spanish – is not direct evidence of discrimination. At most, this reflects the fact that English is the dominant language at Columbia House, but is not evidence of an intent to discriminate on the basis of national origin.

2. Indirect Evidence

Columbia House contends Plaintiff cannot establish a prima facie case of national origin discrimination on grounds that (1) she cannot show she was meeting her employer's legitimate expectations, and (2) she cannot identify similarly situated employees outside her protected class who were treated more favorably.

a. Legitimate Expectations

As set forth in Section III.A.2.a.1., the court finds Plaintiff was not meeting Columbia House's legitimate expectations.

b. Similarly Situated Employees

Plaintiff asserts she is similarly situated to Phillips and Bridwell. The court has already discussed the reasons why Plaintiff is not similarly situated to these Columbia House employees. Accordingly, the court finds Plaintiff is unable to establish her prima facie case of discrimination.

D. Mixed Motive Analysis

In the final section of Plaintiff's Response, Plaintiff asserts that she may be able to pursue her Title VII disparate treatment claim under a mixed-motives analysis. In support of her argument, Plaintiff cites the court to *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). In that case, the Supreme Court held that in the context of Title VII, direct evidence of discrimination is not required in a mixed motives case. 539 U.S. at 101. This case focused on the proper jury instruction at trial. Thus, its application to a summary judgment motion is not clear. At any rate, Plaintiff still bears the burden of showing that her national origin was a motivating factor in her termination. Plaintiff has failed to carry her burden. Accordingly, the application of *Desert Palace* to this case is moot.

For all of the reasons cited above, Columbia House's Motion for Summary Judgment is **GRANTED**.

E. Motion to Strike Portions of Plaintiff's Surreply Brief

In response to Plaintiff's filing of a surreply brief, Columbia House filed a document entitled Defendant's Response and Motion to Strike Portions of Plaintiff's Surreply Brief. Columbia asserts that Plaintiff's Surreply fails to comply with Local Rule 56.1, which provides that a non-moving party may file a surreply limited to evidence submitted, and admissibility objections raised, for the first time in a reply brief. S.D. Ind. L.R. 56.1(d). To the extent that

Plaintiff's Surreply merely rehashes old arguments and otherwise fails to address any new evidence, or evidentiary objections, raised in the Columbia House's Reply Brief, Columbia House's motion is **GRANTED**.

IV. Conclusion

For the reasons set forth above, the court **GRANTS** Defendant's Motion for Summary Judgment, and **GRANTS** Defendant's Motion to Strike Portions of Plaintiff's Surreply Brief.

SO ORDERED this 31st day of March 2005.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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