- Dr. Estilo clarified that as part of management, he himself felt pressured (he was not receiving pressure from Thompson, as Cunningham characterized it) to motivate his group, including Cunningham, "to do a little more";[22] and

- Cunningham's current manager, James Citak ("Citak"), gave the following 2012 evaluation: "Overall 2012 was a successful year for Jean. I look forward to additional accomplishments in 2013."[23] Citak further testified that Cunningham received compliments from the director and executive director, noting, "…since the reorganization [in August 2012] … Jean seemed to be enthusiastic to work and that she was doing a good job and, you know, was really somebody that was helping to support the reorganization so that it was successful."[24]

The full context of these remarks as well as performance evaluations noting that Cunningham "meets expectations", coupled with gift recognitions of appreciation, salary increases, and bonuses are inconsistent with Cunningham's assertion that Novo Nordisk regarded her as having a "substantially limiting" impairment. *See Hershgordon*, 285 Fed. Appx. at 848. Consequently, a reasonable jury could not find that Novo Nordisk regarded Cunningham as disabled. Cunningham, therefore, fails to meet the first prong in her ADA discrimination claim.

B. Qualified to Perform Essential Functions of the Job

There is no dispute that Cunningham is a "qualified individual" under the ADA, as evidenced in her 2011 evaluation which indicated that she had been fully handling her adverse event report responsibilities approximately one month after returning from medical leave, was contributing to an increased workload,[25] and had resumed many of her former responsibilities. In her performance evaluation, Cunningham received a "meets expectations" rating and an accompanying bonus.

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[22] Estilo Dep., 69:6-70:10, July 12, 2013.
[23] Citak Dep., 21:4-11, July 12, 2013.
[24] *Id.*, 49:6-50:5.
[25] *See* Pl. Ex. at NN000134-142 [ECF 22-16].

C. Adverse Employment Decision

As to the third prong, Cunningham must show that she suffered an adverse employment decision as a result of discrimination. Failure to establish that a plaintiff suffered an adverse employment action can result in the granting of a motion for summary judgment. *See Burton v. Teleflex Inc.*, 707 F.3d 417, 427 (3d Cir. 2013); s*ee also Duffy v. Paper Magic Group, Inc.*, 265 F.3d 163, 171 (3d Cir. 2001) (affirming the district court's grant of summary judgment because the plaintiff did not produce evidence from which a reasonable jury could find an adverse employment action).

An adverse employment action is defined as "a significant change in employment status, such as, in hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 152-53 (3d Cir. 1999) (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). "An adverse employment action may be found where an employee's earning potential has been substantially decreased and a significant disruption to her working conditions results." *Id.* at 153.

Cunningham enumerates the following adverse employment actions: Novo Nordisk engaged in a "stealth" campaign to increase her workload; Rivera negatively commented on Cunningham's performance during PRB meetings while she was on medical leave and unable to defend herself; and she was treated with hostility and disdain when she needed to go to the doctor and/or work from home.

Notwithstanding these allegations, Cunningham admits that she has never received any verbal or written warnings of inferior work product, discipline, demotion, or pay cut, nor was she

terminated from her position at Novo Nordisk or placed on a performance improvement plan.[26] Cunningham is currently employed at Novo Nordisk, and on two occasions, once during and once after her medical leave of absence, her work contributions were recognized by management with gift certificates, and "award points".[27] Cunningham received "meets expectations" ratings in her 2010, 2011, and 2012 performance evaluations,[28] and her annual salary reflects an upward trend, starting at $100,000 and gradually increasing by March 11, 2013, to $113,600, with annual bonuses ranging from $15,000 to $23,700.[29]

Cunningham's own deposition testimony contradicts assertions that she suffered adverse employment actions. Regarding the increased workload, work was gradually assigned after Cunningham had been cleared of any medical restriction,[30] and she acknowledged that the increased workload applied department-wide.[31] In addition, Cunningham expressed uncertainty whether Rivera's criticism about her contributions at PRB meetings were related to her disability leave of absence or medical condition. It is clear, however, that Rivera's criticism did not negatively manifest in Cunningham's 2011 evaluation as evidenced by the bonus she received that year. Although Cunningham depicted Dr. Estilo's reactions to her requests to attend doctor's appointments as being "a little perturbed" or "act[ing] disgusted",[32] she acknowledged that Novo Nordisk has never denied any request for medical leave.[33]

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[26] Cunningham Dep., 180:22-181:14, July 9, 2013.
[27] *Id.*, 82:11-84:17; 127:24-128:14; 169:6-10; Pl. Ex. at NN000317, 319 [ECF 22-16].
[28] Pltf Ex. at NN000128-NN000148 [ECF 22-16].
[29] Dft. Ex. 7 at NN000084 [ECF 19-10].
[30] Cunningham Dep., 147:11-13; 156:1-6, July 9, 2013.
[31] *Id.*, 151:17-152:2.
[32] *Id.*, 129:11-24; 131.
[33] *Id.*, 159:12-16.

Considering the totality of evidence and the absence of any change in her employment status, a reasonable jury could not conclude that Cunningham suffered an adverse employment action, much less hostility and disdain.

II. Failure to Accommodate Claim

The ADA specifically provides that an employer discriminates against a qualified individual with a disability when the employer does "'not mak[e] reasonable accommodations to the known physical or mental limitations of the individual unless the [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the [employer].'" *Taylor v. Phoenixville School Dist.,* 184 F.3d 296, 306 (3d Cir. 1999) (quoting 42 U.S.C. § 12112(b)(5)(A)) (alterations in original). "Reasonable accommodation" additionally "includes the employer's reasonable efforts to assist the employee and to communicate with the employee in good faith," *Mengine v. Runyon,* 114 F.3d 415, 416 (3d Cir. 1997), under what has been termed a duty to engage in the "interactive process." *Williams*, 380 F.3d at 761.

"An employee can demonstrate that an employer breached its duty to provide reasonable accommodations because it failed to engage in good faith in the interactive process by showing that: '1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.'" *Williams,* 380 F.3d at 772 (quoting *Taylor,* 184 F.3d at 319-20).

In addition to this Court's finding that Cunningham has failed to introduce sufficient evidence of a disability, this Court also finds that Cunningham's argument that Novo Nordisk did not accommodate her alleged disability is disingenuous in light of her testimony that she

received all of the leave of absence she felt she needed, including an additional six days to recover after her FMLA leave officially ended on January 11, 2011.[34] She also admitted that her workload was gradually increased, and that on numerous occasions she was allowed to work from home. As stated, Dr. Kempf requested a modified work schedule from four hours to six hours part-time to full-time, to accommodate Cunningham's recovery, which Novo Nordisk granted without modification pursuant to its policy.[35] Cunningham discussed her part-time return to work schedule with Dr. Estilo, and Thompson was also aware of this request, without issue.[36] They agreed to reduce Cunningham's workload upon her initial return from medical leave so as not to stress her out;[37] Dr. Estilo assigned Cunningham to clinical trials[38] and instructed co-workers not to assign her any post-marketing event cases and that "in due time, she [would] be joining the rotation";[39] and when Cunningham was reassigned post-marketing cases in April 2011, she had no objection.[40] Cunningham further testified that she was not asked to take on any responsibilities she did not have prior to her medical leave.[41]

Additional accommodations were made for Cunningham to work from home, a practice which prior to taking medical leave, Cunningham engaged either on a "very infrequent" basis or not at all.[42] During an eight-month period following her return to work, from January 2011 to August 2011, Dr. Estilo permitted Cunningham to work from home (a "privilege" of

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[34] Cunningham Dep., 78:5-79:2, July 9, 2013.
[35] Dft. Ex. 2 at EEOC000038-39 [ECF 19-5].
[36] Cunningham Dep., 81:6-9, July 9, 2013; Thompson Dep., 9:22-23; 23:8-14; 48:6-9, July 12, 2013 [ECF 22-13]; Dft. Ex. 21 [ECF 19-24].
[37] Thompson Dep., 46:5-47:10, July 12, 2013.
[38] Cunningham Dep., 112:4-18, July 9, 2013.
[39] Pl. Ex. at NN000372 [ECF 22-16].
[40] Cunningham Dep., 155:12-156:6, July 9, 2013.
[41] *Id.*, 148:7-14.
[42] *Id.*, 58:1-6.

employment, according to Cunningham)[43] or take half sick days and work from home to attend doctor appointments on at least 23 occasions even when some of those days were for reasons unrelated to her medical condition, such as her dog having surgery or having a thermostat repaired.[44]

The ADA requires that employers and employees engage in an interactive process to identify the employee's limitations resulting from a disability and the kinds of accommodation which would be both appropriate and feasible. *Jacoby v. Bethlehem Suburban Motor Sales*, 820 F. Supp. 2d 609, 622 (E.D. Pa. May 17, 2011) (citing 29 C.F.R. § 1630.2(o)(3)). The Third Circuit has held that "*both* parties have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith." *Taylor*, 184, F.3d at 312 (emphasis added). Once back to work full-time, Cunningham did not make any requests for changes in her job duties to accommodate her medical condition.[45] However, in a letter dated May 15, 2011, Dr. Kempf opined that Cunningham could not "manage the increased work load of her position" and stated that "if her work load is not decreased or stress levels are not diminished further coronary disease and subsequent myocardial injury might occur." Dr. Estilo testified that he never saw this letter and Cunningham does not recall ever submitting it to him.[46] Cunningham also testified that she never requested Dr. Estilo to decrease her workload once she returned from medical leave, specifying that she did not ask for any changes in her job as a result of chest pain she was feeling; she just "plugged through."[47] Cunningham acknowledged the lack of notice to Dr. Estilo

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[43] *See* Pl. Resp. at 12 [ECF 22].
[44] *See, e.g.,* Pl. Ex. B [ECF 22-2]; Pl. Ex. C [ECF 22-4]; Dft Ex. 17 [ECF 19-20]; Dft. Ex. 18 [ECF 19-21]; Dft. Ex. 19 [ECF 19-22]; Dft. Ex. 20 [ECF 19-23]; Dft. Ex. 23 [ECF 19-26]; Pl. Ex. at NN000384 [ECF 22-2]; Pl. Ex. at 000376, 373[ECF 22-3]; Pl. Ex. at NN000371 [ECF 22-7]; Pl. Ex. at NN000469 [ECF 22-8]; Pl. Ex. at NN000473 [ECF 22-10]; Pl. Ex. at NN000374 [ECF 22-16].
[45] Cunningham Dep., 194:20-23, July 9, 2013.
[46] Estilo Dec., ¶¶ 4, 5, Dft. Ex. 28 [ECF 19-31]; Cunningham Dep., 197:11-17, July 9, 2013.
[47] Cunningham Dep., 150:16-151:5, July 9, 2013.

when she complained to the EEOC that it would be "useless to approach Dr. Estilo regarding [her] chest pain and extreme stress induced fatigue with Dr. Estilo, as he would not understand."[48] Cunningham's psychologist, Leonard Scheiner, M.Ed., also wrote her a doctor's note in support of taking time off in November 2011, but Cunningham neither submitted these materials nor took the time off.[49]

Given the work schedule flexibility provided by Novo Nordisk as well as Cunningham's inaction in seeking other accommodation(s) upon her return to work, this Court finds that Cunningham's failure to accommodate claim is unsubstantiated.

III. Hostile Work Environment

Cunningham contends that upon her return from medical leave, she was subjected to a hostile work environment. To state a *prima facie* hostile work environment claim under the ADA, Cunningham must allege that:

> (1) [s/he] is a qualified individual with a disability under the ADA, (2) [s/he] was subject to unwelcome harassment, (3) the harassment was based on [his/her] disability or request for an accommodation, (4) the harassment was sufficiently severe or pervasive to alter the conditions of [his/her] employment and create an abusive working environment, and (5) the employer knew or should have known of the harassment and failed to take prompt, effective remedial action. *Walton v. Mental Health Ass'n of Se. Pa.,* 168 F.3d 661, 667 (3d Cir. 1999).

Koller v. Riley Riper Hollin & Colagreco, 850 F. Supp. 2d 502, 515 (E.D. Pa. 2012) (citing *Lowenstein v. Catholic Health East,* 820 F. Supp. 2d 639, 646–47 (E.D.Pa. 2011)). As stated, Cunningham has not sustained her burden of establishing that she is disabled under the ADA. Therefore, having failed to establish the first element of a *prima facie* hostile work environment claim, this analysis need not proceed further.

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[48] Cunningham Dep., 148:21-25, July 9, 2013.
[49] *Id.*, 132:10-12; 187:6-188:17.

IV. FMLA Retaliation Claim

Like her ADA discrimination claims, in the absence of evidence that Novo Nordisk intentionally discriminated against her, Cunningham's FMLA retaliation claim is also subject to the *McDonnell Douglas* burden-shifting framework. *Atchison v. Sears*, 666 F. Supp. 2d 477, 490 (E.D. Pa. 2009) (citation omitted); *see also Yandrisevitz v. H.T. Lyons, Inc.*, 2009 WL 2195139, at *10 (E.D. Pa. July 22, 2009) ("Where, as here, there is only indirect evidence of a violation of the FMLA, courts in the Third Circuit apply the *McDonnell Douglas* burden-shifting framework."). Cunningham, therefore, has the initial burden of establishing a *prima facie* case of retaliation, and must point to evidence in the record sufficient to create a genuine factual dispute about each of the three elements of her retaliation claim: (a) invocation of an FMLA right, (b) termination or adverse employment decision, and (c) causation. *Lichtenstein v. Univ. of Pittsburgh Med. Ctr.*, 691 F.3d 294, 301-2 (3d Cir. 2012); *see also Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 508 (3d Cir. 2009); *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 146 (3d Cir. 2004). If she establishes a *prima facie* showing, the burden of production shifts to Novo Nordisk to "articulate some legitimate, nondiscriminatory reason" for its decision. *McDonnell Douglas,* 411 U.S. at 802. Once this requirement is met, Cunningham "must point to some evidence, direct or circumstantial, from which a factfinder could reasonably ... disbelieve [Novo Nordisk's] articulated legitimate reasons." *Fuentes v. Perskie,* 32 F.3d 759, 764 (3d Cir. 1994).

The record is devoid of evidence to establish two of the three elements of an FMLA retaliation claim: that Cunningham was terminated or suffered an adverse employment decision, or causation. In the absence of such evidence, her FMLA retaliation claim fails.

Further, for the reasons stated, Cunningham has not presented sufficient evidence to establish a *prima facie* claim of discrimination under the ADA. In the absence of discrimination, this Court need not address the issues of pretext and vicarious liability.

CONCLUSION

For the reasons stated, this Court concludes that Cunningham has failed to present credible evidence that she is a disabled person or is "regarded as" disabled within the meaning of the ADA, and that she suffered an adverse employment decision. Under the circumstances, her claims of discrimination under the provisions of the ADA and of FMLA retaliation cannot survive the motion for summary judgment. Consequently, Novo Nordisk's motion for summary judgment is granted, and this action is dismissed.

An appropriate order consistent with this memorandum opinion follows.

Nitza I. Quiñones Alejandro, U.S.D.J.