

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-11344
Non-Argument Calendar

RAJESH MOTIBHAI PATEL,

Plaintiff-Appellant,

versus

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:24-cv-02263-TRJ

Before ROSENBAUM, JILL PRYOR, and BRANCH, Circuit Judges.

PER CURIAM:

Rajesh Patel appeals the district court's order granting a motion to dismiss his complaint against the Secretary of the U.S. Department of Veterans Affairs ("Secretary") for discrimination and

retaliation arising from his employment as a physician at the Department of Veterans Affairs Medical Center in Atlanta (“VA” or “Atlanta VA”). The district court dismissed six of Patel’s ten claims for failure to exhaust administrative remedies and the remaining four for failure to state a plausible claim to relief. After careful review, we conclude that the court erred in dismissing two claims for failure to exhaust, so we vacate their dismissal and remand for further proceedings. We affirm the district court in all other respects.

I.

We start with the facts alleged in Patel’s complaint, as supplemented by its attachments. In February 2020, the VA suspended Patel’s clinical privileges “for examination in absence of chaperone.” Patel requested a hearing under 42 U.S.C. § 11112, but no hearing was held. Patel contacted an Equal Employment Opportunity (“EEO”) Counselor and then, in October 2020, filed a formal complaint of discrimination, which was assigned the case number 200I-0508-2020106523.

In April 2020, the VA certified that Patel was at “high risk” for COVID-19 infection, based on his age and diabetes. But Patel was ordered to be “on site daily” and could not telework. In October 2022, Patel, his wife, and his disabled mother were all infected with COVID-19.

On February 17, 2023, a nurse on the “purple team” refused to permit Patel to join a luncheon for which he had been invited and paid \$20, telling him loudly in front of others, “You cannot be

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here.” In early January 2023, the same nurse had refused to schedule him for “Huddle Education” about sexually transmitted diseases, and, in front of three Emory University residents, had asked him to leave a room on January 25, 2023.

On February 17, 2023, Patel sent an email to his supervisors with the subject line, “EEO Complaint - Confidential,” complaining about being told to leave on January 25 and February 17. He wrote that he had an “ongoing EEO complaint for Discrimination under TITLE VII, ADEA, ADA, Reprisal,” and that he was “fil[ing] this complaint against [the nurse] for violation of my rights under Federal Employment.”

Patel sent a follow-up email on February 24, 2023, stating that he had not received “any response,” and copied the email to the VA’s EEO Department. Soon after, a nurse manager for the purple team emailed a response, stating that “the Purple Clinic staff was informed that Dr. Patel was not permitted in the Purple clinic,” and copied the “Primary Care Leadership for clarification.” Patel replied with additional details about how he had been invited to the luncheon. Later that same day, Patel’s supervisor, Dr. Andrea Lambert, replied and directed Patel to “please reframe [sic] from visiting the clinical teams.” Dr. Lambert also ordered Patel to return his key to the purple-team door.

After contacting an EEO Counselor, Patel filed a formal complaint of discrimination arising from these events on April 21, 2023. This complaint was assigned the case number 200I-508-2023-150972.

Meanwhile, on April 19, 2023, a federal grand jury returned a criminal indictment charging Patel with sexually abusing patients at the VA in 2019 and 2020. *See United States v. Rey*, 811 F.2d 1453, 1457 n.5 (11th Cir. 1987) (“A court may take judicial notice of its own records and the records of inferior courts.”). The VA indefinitely suspended Patel in May 2023. He has since been convicted and sentenced for depriving a patient, A.H., of her right to bodily integrity, *see* 18 U.S.C. § 242, and for abusive sexual contact, *see id.* § 2244(b). *See United States v. Patel*, No. 25-10653, 2025 WL 3751845 (11th Cir. Dec. 29, 2025).

In February 2024, the VA terminated Patel’s employment. A February 22, 2024, letter signed by Lovetta Ford, the interim director of the VA, stated that his termination was for failure to maintain current medical licensure and noted that Patel had relinquished his New York license in June 2023. At that time, according to Patel, he had a current unrestricted Georgia medical license and unrestricted federal drug license.

On May 14, 2024, the VA issued a final order on his April 2023 EEO complaint, accepting a decision by an administrative judge with the Equal Opportunity Commission (“EEOC”).

II.

In May 2024, Patel filed a *pro se* complaint alleging ten claims of employment discrimination arising out of his employment as a physician at the Atlanta VA. He broadly alleged discrimination

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based on “race Asian, color brown, religion Hindu, disability diabetes, age born 1955, gender male, national origin Indian, [and] prior EEO complaint activity.”

Patel’s complaint alleged that his February 2024 termination was retaliatory and pretextual (Count 1) and lacking in due process (Count 2). He asserted that his exclusion from the February 2023 luncheon was discriminatory based on his diabetes (Count 3) and violated his First Amendment right to peaceable assembly (Count 4), that it was part of a series of harassing incidents (Count 5), and that he was retaliated against for his EEO activity regarding the luncheon (Count 6). He alleged that he suffered “disparate treatment discrimination” stemming from the February 2020 suspension of his clinical privileges (Count 7), and a violation of his due-process rights when the VA refused to hold a hearing on the suspension (Count 8). Beyond this, Patel claimed that the VA denied him the reasonable accommodation of telework during the COVID-19 pandemic (Count 9). And finally, he alleged that a VA administrator submitted a false document to the EEOC in April 2024 (Count 10).

A.

The VA filed a motion to dismiss for lack of jurisdiction and failure to state a claim under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), respectively. The VA argued that Patel failed to administratively exhaust Counts 1, 2, 7, 8, 9, and 10, and most of Count 5, and so the court lacked jurisdiction to consider those

claims. As for the remaining claims, the VA contended that Patel failed to state plausible claims to relief.

In support of its motion to dismiss, the VA submitted an affidavit from a VA staff attorney, as well as certain administrative records, from case number 200I-508-2023-150972. As relevant here, a notice of acceptance of Patel’s April 2023 EEO complaint, dated May 26, 2023, listed four claims accepted for investigation: (1) a nurse telling him to leave in January 2023; (2) his exclusion from the purple-team luncheon in February 2023; (3) work limitations imposed after he complained about the luncheon exclusion; and (4) his indefinite suspension in May 2023. An EEO investigative report, dated September 29, 2023, listed and addressed the same four incidents. Finally, an order by an EEOC administrative judge, dated May 13, 2024, granted summary judgment for the VA, declined to allow Patel to amend his EEO complaint to include his February 2024 termination, and directed the agency to open a separate EEO complaint with respect to his termination, which the judge viewed as a new and distinct claim.

Responding in opposition, Patel argued that exhaustion was intertwined with the merits, so it was not appropriate for decision under Rule 12(b)(1), and that he had exhausted his administrative remedies. In support, he submitted additional documents, including an excerpt from a case report filed with the EEOC. The parties agree that this filing—what they call the “PCI”¹—was drafted by a

¹ “Exhibit 2” of Patel’s response to the motion to dismiss consists of three non-consecutive, and not necessarily connected, pages. The first page purports to

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VA attorney, and Patel states that it was filed in January 2023. The PCI appears to list various “accepted issues” related to the February 2020 suspension of Patel’s clinical privileges, and it cites to an “ROI,” which may stand for a report of investigation. The VA replied that the PCI was inadequate to show exhaustion. Patel replied and asked for a hearing.

B.

In a report and recommendation (“R&R”), a magistrate judge concluded that Patel failed to exhaust his administrative remedies as to all claims not listed in the May 2023 notice of acceptance. The judge opined that the PCI was not relevant to exhaustion because it “relate[d] to a previous suspension that Patel received in 2020,” and it “contain[ed] information provided to the ALJ [administrative law judge], rather than claims submitted by Patel to [the agency] for investigation.” The judge also noted that the ALJ had refused to permit amendment of the EEO complaint to include Patel’s termination in February 2024. The judge nonetheless concluded that Patel adequately exhausted the harassment claim (Count 5), even if he did not specifically mention each incident in

be a “Preliminary Case Information (PCI)” for “Agency Case Number: 200I-508-2023-150972,” the number assigned to Patel’s April 2023 EEO complaint. The second and third pages of the exhibit are pages 3 and 4 of an EEOC filing in support of the “Agency’s request for a decision on the record,” listing accepted issues regarding the February 2020 suspension of Patel’s criminal privileges. Those events were the subject of Patel’s October 2020 EEO complaint, under the case number 200I-0508-2020106523.

his EEO complaint. Thus, the magistrate judge recommended dismissing Counts 1, 2, 7, 8, 9, and 10 without prejudice for lack of subject-matter jurisdiction.

Turning to the remaining counts, the magistrate judge recommended granting the VA's motion to dismiss for failure to state a claim. The magistrate judge concluded that Patel had not alleged a viable discrimination claim (Count 3), that the First Amendment claim was barred by sovereign immunity and was not viable in any case (Count 4), that the instances of harassment were not based on Patel's disability or severe or pervasive enough to qualify as a hostile work environment (Count 5), and that Patel did not engage in protected activity when he complained about his exclusion from the luncheon because his belief that unlawful discrimination occurred was not objectively reasonable (Count 6).

Patel submitted objections to the R&R, and the VA replied. Patel also attached additional materials, including a notice of acceptance of his October 2020 EEO complaint, dated November 12, 2020, listing issues—largely consistent with the PCI—that had been accepted for investigation.

C.

The district court adopted the R&R in part and overruled it in part. The court explained that the failure to exhaust was not jurisdictional and was subject to equitable tolling, so dismissal for lack of subject-matter jurisdiction was not appropriate. Nonetheless, the court found that Patel still failed to establish exhaustion or an entitlement to equitable tolling. The court noted that it had “no

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information regarding the outcome of [Patel's] 2020 EEO Complaint," and that it did not appear Patel had filed, or was prevented from filing, a timely lawsuit based on that complaint. The court also observed that Patel did not further pursue a claim based on his termination after the EEOC judge denied his motion to amend.

Accordingly, the district court dismissed Counts 1, 2, 7, 8, 9, and 10 without prejudice for lack of exhaustion, and, after considering Patel's other objections, it dismissed Counts 3–6 with prejudice for failure to state a claim. Patel timely appeals.

III.

We review a district court's "dismissal of a claim for failure to exhaust administrative remedies *de novo*." *Jimenez v. U.S. Att'y Gen.*, 146 F.4th 972, 987 (11th Cir. 2025). We also review *de novo* "the grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim, accepting the complaint's allegations as true and construing them in the light most favorable to the plaintiff." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1335 (11th Cir. 2012).

We liberally construe documents drafted by *pro se* parties. *Campbell v. Air Jamaica Ltd.*, 760 F.3d 1165, 1168-69 (11th Cir. 2014). Yet liberal construction "does not give a court license to serve as *de facto* counsel for a party, or to rewrite an otherwise deficient pleading in order to sustain an action." *Id.* And "issues not briefed on appeal by a *pro se* litigant are deemed abandoned." *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008).

IV.

“The Rehabilitation Act prohibits federal agencies from engaging in employment discrimination against otherwise qualified individuals with a disability.” *Mullin v. Sec’y, U.S. Dep’t of Veterans Affairs*, 162 F.4th 1296, 1303 (11th Cir. 2025); *see* 29 U.S.C. § 794. Similarly, Title VII prohibits employers—including the federal government—from discriminating against employees on the basis of race, color, religion, sex, or national origin. *Ramirez v. Sec’y, U.S. Dep’t of Transp.*, 686 F.3d 1239, 1243 (11th Cir. 2012); *see* 42 U.S.C. § 2000e-16(a). The remedies, procedures, and rights of Title VII are available to plaintiffs filing complaints under the Rehabilitation Act. *Shiver v. Chertoff*, 549 F.3d 1342, 1344 (11th Cir. 2008); *see* 29 U.S.C. § 794a(a)(1).

A.

We start with administrative exhaustion. Before suing for discrimination in federal court, “federal employees must seek relief from the agency where the alleged discrimination occurred.” *Jimenez*, 146 F.4th at 988. This requirement is “part and parcel of the congressional design to vest in the federal agencies and officials engaged in hiring and promoting personnel primary responsibility for maintaining nondiscrimination in employment.” *Ramirez*, 686 F.3d at 1243 (quotation marks omitted).

Federal regulations require federal employees to first raise discrimination claims administratively through an internal complaints process within 45 days of the alleged discriminatory conduct. *See* 29 C.F.R. §§ 1614.105(a)(1), 1614.106; *see Hogan v. Sec’y*,

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U.S. Dep't of Veterans Affairs, 121 F.4th 172, 174 (11th Cir. 2024) (describing this process in greater detail). “If dissatisfied with the agency’s resolution, the employee may bring a claim to the EEOC, which will issue its own recommendation.” *Ellis v. England*, 432 F.3d 1321, 1324 (11th Cir. 2005); *see* 29 C.F.R. § 1614.109. The agency then reviews the decision of the EEOC administrative judge and issues a final order. 29 C.F.R. § 1614.110(a).

“[A] plaintiff’s judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.” *Patterson v. Georgia Pac.*, 38 F.4th 1336, 1345 (11th Cir. 2022) (quotation marks omitted). Thus, a plaintiff may bring claims in court that “amplify, clarify, or more clearly focus the allegations in the EEOC complaint.” *Batson v. Salvation Army*, 897 F.3d 1320, 1327 (11th Cir. 2018) (quotation marks omitted). But “allegations of new acts of discrimination are inappropriate.” *Id.*

As the district court correctly recognized, a federal employee’s failure to exhaust administrative remedies is not jurisdictional. *See Hogan*, 121 F.4th at 178 (“[A] federal employee’s untimely filing of an administrative complaint with the agency is subject to equitable tolling.”); *Ramirez*, 686 F.3d at 1243 (holding that the 45-day charging period for federal employees is “not jurisdictional” and is subject to waiver, estoppel, and equitable tolling); *see also Fort Bend County v. Davis*, 587 U.S. 541, 550–51 (2019) (holding that Title VII’s ordinary charge-filing requirement is not jurisdictional). Equitable tolling may apply when “a litigant has pursued

his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.” *Fedance v. Harris*, 1 F.4th 1278, 1284 (11th Cir. 2021) (quotation marks omitted).

Here, the district court did not err in dismissing Counts 1, 2, 9, and 10 for failure to exhaust administrative remedies. The record shows that Patel filed and pursued two EEO complaints of discrimination, in October 2020 and April 2023, respectively. Neither complaint alleged that he had been denied a reasonable accommodation of telework during the COVID-19 pandemic (Count 9), covered matters surrounding his termination in February 2024 (Counts 1, 2), or mentioned the filing of a false document in April 2024 (Count 10).

Although Patel appears to have initiated EEO contact after his February 2024 termination, and then moved to amend his April 2023 complaint to include his termination, the EEOC administrative judge denied that motion and ordered the agency to “process[] the new claim of removal as a separate EEO complaint.” Patel does not dispute the administrative judge’s finding that his termination qualified as a new act of discrimination that did not grow out of his initial filing. *See Batson*, 897 F.3d at 1327. He also does not provide any information about any subsequent EEOC proceeding concerning his termination. Accordingly, the district court did not err in concluding that Patel failed to exhaust administrative remedies for his termination before bringing this lawsuit, and that equitable toll-

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ing was not available because nothing prevented him from pursuing a separate complaint about his termination. *See Jimenez*, 146 F.4th at 988; *Fedance*, 1 F.4th at 1284.

Nevertheless, the limited materials available for our review do not support the VA's assertion in its motion to dismiss that Patel "did not raise [Counts 7 and 8] with the EEOC" or that "the EEOC never investigated those claims." Patel's complaint included his October 2020 EEO complaint, which covered the same matters alleged in Counts 7 and 8. Patel also submitted documents, including the PCI, indicating that these matters had been accepted and investigated during proceedings on that complaint. Thus, the record shows that Patel raised Counts 7 and 8 with the EEOC and that these matters were investigated.

The Secretary points to the magistrate judge's findings that the PCI did not support exhaustion because (a) "the issues listed therein relate to a previous suspension that Patel received in 2020"; (b) and it "contain[ed] information provided to the ALJ, rather than claims submitted by Patel to ORM for investigation." But the fact that Patel's judicial complaint may have covered multiple administrative proceedings does not alone show lack of exhaustion or untimeliness. And information provided to the ALJ by the VA on claims that were "accepted" for investigation strikes us as probative of exhaustion. Plus, we know that Patel submitted these matters for investigation based on the October 2020 EEO complaint and the November 2020 notice of acceptance.

The district court further noted that it “ha[d] no information regarding the outcome of his 2020 EEO Complaint,” and that Patel could have filed a lawsuit within 180 days after his initial February 2020 complaint if no final action was taken, but he “did not file an action.” It’s true that the record does not show the outcome of the 2020 complaint. But Patel did file an action—this one—asserting claims based on his 2020 suspension in Counts 7 and 8. And it is not necessarily untimely, since we don’t know when (or if) final agency action on his complaint occurred. See 29 C.F.R. § 1614.407(a) (authorizing a civil action “[w]ithin 90 days of receipt of the agency final action on an individual or class complaint”).

Plaintiffs generally “are not required to specially plead or demonstrate exhaustion in their complaints.” *Perttu v. Richards*, 605 U.S. 460, 469 (2025) (quotation marks omitted) (concerning the Prison Litigation Reform Act’s administrative exhaustion requirement). Nothing “on the face of the complaint” or in any of Patel’s attachments shows a failure to exhaust Counts 7 and 8. See *Wells v. Brown*, 58 F.4th 1347, 1356–57 (11th Cir. 2023) (“[T]he question is whether the plaintiff’s failure to exhaust appears on the face of the complaint.”). Plus, the VA’s motion to dismiss did not assert that the proceeding on the 2020 EEO complaint was deficient in some respect, nor did it include any records from that case. Without more, we cannot agree that Patel failed to exhaust his administrative remedies for Counts 7 and 8, so we vacate the dismissal of these claims and remand for further proceedings.

B.

Next, we consider the district court’s dismissal of Counts 3–6 for failure to state a claim. To survive a motion to dismiss for failure to state a claim, the complaint must contain enough facts to support a reasonable inference that the defendant is liable for the misconduct alleged. *Doe v. Samford Univ.*, 29 F.4th 675, 685 (11th Cir. 2022). In evaluating whether a claim is facially plausible under this standard, “courts may infer from the factual allegations in the complaint obvious alternative explanations, which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer.” *Id.* at 686 (quotation marks omitted).

In Count 3, Patel alleged that he was discriminated against based on his disability (diabetes), when a nurse forced him to leave a luncheon in February 2023. “To state a discrimination claim under the [Rehabilitation Act], a plaintiff must allege sufficient facts to plausibly suggest (1) that he suffers from a disability, (2) that he is a qualified individual, and (3) that a covered entity discriminated against him on account of his disability.” *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1246 (11th Cir. 2015) (quotation marks omitted) (ADA case); *Ellis*, 432 F.3d at 1326 (“The standard for determining liability under the Rehabilitation Act is the same as that under the Americans with Disabilities Act.”).

Patel’s allegations are insufficient to state a claim. Nothing in the complaint suggests that the nurse was aware of Patel’s disability, or that her exclusion of Patel had anything to do with his disability or any other protected characteristic. Patel’s briefing

does not address the merits of this claim except to note that it was “part of Claim 5,” the harassment claim. Accordingly, we affirm the dismissal of Count 3.

In Count 4, Patel alleged that his exclusion from the February 2023 luncheon violated his First Amendment right to peaceable assembly. The district court determined that this claim was not viable because it was barred by sovereign immunity and because the Constitution does not recognize “a generalized right of ‘social association.’” *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Because Patel’s briefing fails to address these grounds for dismissal, we deem this claim abandoned. *See Timson*, 518 F.3d at 874.

In Count 5, Patel alleged a claim of harassment based on events dating back to 2019, including disrespectful comments by nurses; a nurse’s falsification of a patient record; the agency’s refusal to permit Patel to take medical records with him to testify for a veteran in state court, resulting in the veteran’s incarceration; a nurse’s exclusion of Patel from events including the February 2023 luncheon; and VA management’s response to his complaint about being forced from the luncheon.

To state a claim for a hostile work environment, a plaintiff must establish that (1) he belongs to a protected group; (2) he was subjected to unwelcome harassment; (3) the harassment was based on a protected characteristic; (4) the harassment was “sufficiently

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severe or pervasive” to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) the employer was responsible. *Mullin*, 162 F.4th at 1316.²

The district court properly dismissed Patel’s harassment claim. Patel’s factual allegations do not support a reasonable inference that the conduct of which he complained was based on his diabetes, or any other protected characteristic, or that it was sufficiently severe or pervasive enough to alter the terms and conditions of his employment. *See Mullin*, 162 F.4th at 1316. Most of the incidents occurred sporadically over a period of nearly four years. And Patel does not present any facts to suggest that the alleged instances of harassment were in any way related to his disability or other protected category. *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1297 (11th Cir. 2012) (“[O]nly conduct that is ‘based on’ a protected category, such as [a disability] may be considered in a hostile work environment analysis.”). In fact, Patel’s own exhibits identify an obvious alternative explanation suggesting lawful reasons for his exclusion, namely that he was under investigation for misconduct involving the purple-team clinic. *See Doe*, 29 F.4th at 686.

² Patel’s briefing also cites to a case addressing retaliatory harassment. But he does not address the district court’s finding that he did not raise a claim for retaliatory hostile work environment. In any case, it appears the alleged retaliatory harassment is already covered by the retaliation claim in Count 6. *See Buckley v. Sec’y of Army*, 97 F.4th 784, 799 (11th Cir. 2024) (explaining that the ordinary retaliation standard applies to claims by a federal employee for retaliatory hostile work environment).

In Count 6, Patel alleged retaliation for his emails referencing “EEO” and complaining about his exclusion from the February 2023 luncheon. To sustain a claim of retaliation, the plaintiff must show that (1) he engaged in statutorily protected activity, (2) he suffered an adverse action, and (3) the adverse action was causally related to the protected activity. *Patterson v. Georgia Pac., LLC*, 38 F.4th 1336, 1344–45 (11th Cir. 2022).³ Protected activity includes informal opposition to unlawful employment practices. *Id.*

For informal opposition to count as protected activity, the plaintiff must show that he “had a good faith, reasonable belief that the employer was engaged in unlawful employment practices.” *Furcron v. Mail Centers Plus, LLC*, 843 F.3d 1295, 1311 (11th Cir. 2016) (quotation marks omitted). The plaintiff’s belief not only must be subjectively held, but also “objectively reasonable in light of the facts and record present” when “measured by reference to controlling substantive law. *Id.* The plaintiff is not required to show that the conduct complained of is unlawful, but it must “be close enough to support an objectively reasonable belief that it is.” *Id.*

The district court properly dismissed Patel’s retaliation claim for failure to engage in protected activity. Although his email

³ The Rehabilitation Act incorporates the ADA’s anti-retaliation provision, 42 U.S.C. § 12203(a). See 29 U.S.C. §§ 791(f), 793(d), 794(d); *Sutton v. Lader*, 185 F.3d 1203, 1207 n.5 (11th Cir. 1999). And the ADA’s anti-retaliation provision is similar to Title VII’s prohibition on retaliation. *Stewart v. Happy Herman’s Cheshire Bridge, Inc.*, 117 F.3d 1278, 1287 (11th Cir. 1997).

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on February 17, 2024, alleged a “violation of [his] rights under Federal Employment” and referenced an “EEO complaint for Discrimination under TITLE VII, ADEA, ADA, Reprisal,” Patel did not offer any reason to believe that a nurse telling him, “you cannot be here,” on two occasions was motivated by his disability or any other protected ground. Nor has he done so in the district court or on appeal, as we explained above. Accordingly, Patel has not alleged facts from which it would be reasonable to infer that his February 2024 emails evidenced beliefs about the unlawfulness of his employer’s conduct that were “objectively reasonable in light of the facts and record present.” *Furcron*, 843 F.3d at 1311.

V.

In sum, we affirm the dismissal of Counts 1, 2, 9, and 10 for failure to exhaust, and the dismissal of Counts 3–6 for failure to state a claim. We vacate the dismissal of Counts 7 and 8 for failure to exhaust administrative remedies, and we remand for further proceedings consistent with this opinion.

AFFIRMED in part; VACATED in part; REMANDED.⁴

⁴ Patel’s motion to take judicial notice is DENIED.