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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA

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7 ROGER HOLLY,  
8 Plaintiff,  
9 v.  
10 SALLY JEWELL,  
11 Defendant.

Case No. 16-cv-00011-DMR

**ORDER GRANTING PARTIAL  
MOTION TO DISMISS SECOND  
AMENDED COMPLAINT**

Re: Dkt. No. 29

12 Plaintiff Roger Holly (“Plaintiff”) is an African American man and a licensed minister in  
13 the Baptist Church who worked for the National Park Service until his termination on March 10,  
14 2014. Plaintiff was terminated after performing a baptism in Aquatic Park on his lunch break.

15 Plaintiff commenced this action alleging religious and racial discrimination and retaliation  
16 in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., (“Title VII”), a  
17 violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000(bb) et seq. (“RFRA”), and  
18 violation of his First Amendment rights. First Amended Complaint (“FAC”) [Docket No. 16].

19 Defendant moved to dismiss the First Amendment and RFRA claims on the grounds that they  
20 were precluded by Title VII, which provides the exclusive remedy for discrimination in federal  
21 employment. [Docket No. 19]. The court dismissed the RFRA claim with prejudice, but granted  
22 Plaintiff leave to amend the First Amendment claim to the extent he could assert a constitutional  
23 claim that was distinct from his Title VII claim. [Docket No. 27]. The court otherwise dismissed  
24 Plaintiff’s First Amendment claim with prejudice to the extent it was based on discrimination in  
25 his federal employment due to his religious beliefs or activities. *Id.*

26 Plaintiff subsequently filed his Second Amended Complaint (“SAC”), alleging religious  
27 and racial discrimination and retaliation in violation of Title VII, and violation of his First  
28 Amendment rights to free exercise of his religion, free speech and freedom of association.

1 [Docket No. 29].

2 Defendant now moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the  
3 First Amendment claim. Def’s. Partial Motion to Dismiss (“MTD”) [Docket No. 29]. Defendant  
4 argues that Plaintiff has failed to plead a First Amendment claim that is distinct from his Title VII  
5 claims. *Id.* Having considered the parties’ briefs and oral argument, the court **GRANTS**  
6 Defendant’s motion. Plaintiff’s First Amendment claim is dismissed with prejudice.

7 **I. FACTUAL BACKGROUND**

8 The following facts are set forth in Plaintiff’s SAC and accepted as true for the purposes of  
9 this Rule 12(b)(6) motion. Plaintiff, an African American man, is a Baptist Christian and a gospel  
10 minister. He worked at the San Francisco Maritime National Historic Park as a maintenance  
11 worker from May 2012 until his termination in March 2014. In late November 2013, Plaintiff met  
12 with management officials. Among other things, Plaintiff complained that he had been told that  
13 he could not display a Bible that he read on his breaks, although other employees were not  
14 questioned about the reading materials that they kept for their break times. On November 23,  
15 2013, while on a break and out of uniform, Plaintiff performed a baptism in the seashore adjoining  
16 the park. On his next work day, Plaintiff’s supervisor interrogated Plaintiff about the baptism, and  
17 questioned him extensively about his religion. Plaintiff’s supervisor asked Plaintiff what faith he  
18 followed, what he was called at church, and whether he would baptize someone again. Plaintiff  
19 replied that he would never baptize anyone while on the job or in his parks service uniform.  
20 However, to the extent Plaintiff’s supervisor asked if Plaintiff would baptize someone under other  
21 circumstances, Plaintiff replied: “I’m a minister of the gospel, and there’s a wide ocean out there,  
22 what do you think I would do.” On January 28, 2014, Plaintiff’s employer issued a Notice of  
23 Proposed Termination, followed by a termination decision on March 10, 2014. The final agency  
24 decision noted that Plaintiff was terminated for performing a baptism at Aquatic Park.

25 **II. LEGAL STANDARDS**

26 **A. Rule 12(b)(6)**

27 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims  
28 alleged in the complaint. See *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir.

1 1995). When reviewing a motion to dismiss for failure to state a claim, the court must “accept as  
2 true all of the factual allegations contained in the complaint,” *Erickson v. Pardus*, 551 U.S. 89, 94  
3 (2007) (per curiam) (citation omitted), and may dismiss a claim “only where there is no cognizable  
4 legal theory” or there is an absence of “sufficient factual matter to state a facially plausible claim  
5 to relief.” *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010)  
6 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Navarro v. Block*, 250 F.3d 729, 732 (9th  
7 Cir. 2001)) (quotation marks omitted). A claim has facial plausibility when a plaintiff “pleads  
8 factual content that allows the court to draw the reasonable inference that the defendant is liable  
9 for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citation omitted). In other words, the facts  
10 alleged must demonstrate “more than labels and conclusions, and a formulaic recitation of the  
11 elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007)  
12 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)); see *Lee v. City of L.A.*, 250 F.3d 668, 679  
13 (9th Cir. 2001), overruled on other grounds by *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119  
14 (9th Cir. 2002).

### 15 **III. ANALYSIS**

#### 16 **A. First Amendment and Title VII**

17 As discussed in this court’s prior order, Title VII provides the sole remedy for  
18 discrimination in federal employment. See *Holly v. Jewell*, No. 16-CV-00011-DMR, 2016 WL  
19 3670003, at \*3-4, --- F. Supp. 3d ---- (N.D. Cal. July 11, 2016) (discussing *Brown v. Gen. Servs.*  
20 *Admin.*, 425 U.S. 820, 825 (1976)). Accordingly, where a federal employee alleges non-Title VII  
21 claims based on the same “factual predicate” or discrimination underlying a Title VII claim, the  
22 Ninth Circuit has held that Title VII precludes such claims. *Nolan v. Cleland*, 686 F.2d 806, 815  
23 (9th Cir. 1982). In *Nolan*, the plaintiff claimed that she was forced to resign from her employment  
24 because of sex discrimination. In addition to her claims for relief under Title VII, the plaintiff  
25 contended that her involuntary resignation was caused by the defendant’s deceit, coercion and  
26 duress, which constituted a taking of a property interest in violation of her due process rights. The  
27 Ninth Circuit affirmed the dismissal of her constitutional claim, holding that Title VII provided the  
28 exclusive remedy, because “the factual predicate for [the plaintiff’s] due process claim [wa]s the

1 discrimination which [wa]s the basis of her Title VII claim.” Id. at 814-15.

2           However, the Ninth Circuit has also recognized that highly personal tortious conduct such  
3 as defamation or assaultive behavior, as well as certain constitutional violations, may fall outside  
4 the umbrella of discrimination in federal employment, and therefore may not be precluded by Title  
5 VII. See *Brock v. United States*, 64 F.3d 1421, 1423–24 (9th Cir. 1995) (“Title VII is not the  
6 exclusive remedy for federal employees who suffer ‘highly personal’ wrongs, such as defamation,  
7 harassing phone calls, and physical abuse); *Faculty Members at Middle E. Sch. v. Donovan*, No.  
8 15-CV-03974-BLF, 2016 WL 1535080, at \*8-9 (N.D. Cal. Apr. 15, 2016) (“a constitutional claim  
9 may be based on the same set of facts that support a Title VII claim as long as the alleged  
10 unconstitutional action is not employment discrimination”), appeal dismissed (June 13, 2016),  
11 (citing *Arnold v. United States*, 816 F.2d 1306, 1311 (9th Cir. 1987)).

12           Plaintiff concedes that he is not alleging a highly personal violation. *Opp. to Mot.* at 5:7-  
13 19 [Docket No. 31]. Therefore, the court focuses on whether Plaintiff has alleged facts sufficient  
14 to show that his First Amendment claim is separate from the racial and religious discrimination  
15 underlying his Title VII claim.

16           Where courts have concluded that a constitutional claim was not precluded by Title VII,  
17 the alleged unconstitutional conduct was sufficiently different and distinct from the discriminatory  
18 conduct underlying the Title VII claim. For example, in *Ethnic Employees of Library of Congress*  
19 *v. Boorstin*, 751 F.2d 1405 (D.C. Cir. 1985), the plaintiff was “an organization of Library  
20 employees dedicated to promoting non-discriminatory treatment of ethnic and racial minorities at  
21 the Library.” Id. at 1407. The plaintiff alleged that the Library violated Title VII by asserting a  
22 regulation to justify withdrawal of official recognition of the organization, while not requiring  
23 other organizations whose members did not belong to protected groups to adhere to the same  
24 regulation. Id. at 1417. The plaintiff also asserted constitutional violations. The D.C. Circuit held  
25 that Title VII precluded the constitutional claims to the extent that they restated claims of racial,  
26 ethnic, or other discrimination or retaliation cognizable under Title VII. Id. at 1415. However, the  
27 court concluded that Title VII did not preclude other constitutional claims, such as the allegation  
28 that the Library had punished the plaintiff organization and its members for their constitutionally

1 protected criticisms of library policies, and had forced the organization to disclose its membership  
2 list as a condition of official recognition. *Id.* The court held that such allegations fell outside the  
3 scope of Title VII, and that nothing in the history of Title VII suggested that Congress intended to  
4 prevent federal employees from suing their employers for constitutional violations against which  
5 Title VII provides no protection at all. *Id.*

6 Similarly, in *Ray v. Nimmo*, 704 F.2d 1480, 1485 (11th Cir. 1983), the plaintiff alleged that  
7 the Veterans Administration Medical Center (VAMC) discriminated against her based on her age  
8 and gender when it denied her a promotion. She also asserted that the VAMC had violated her  
9 Fifth Amendment due process rights by failing to follow its own plans and regulations. The court  
10 held that her constitutional claim was distinct from and therefore was not precluded by her Title  
11 VII claim, because it was not based on discrimination. Instead, it challenged the deprivation of  
12 her protected property interest without due process based on the VAMC’s failure to abide by the  
13 terms of its merit promotion rules.

14 Unlike *Ethnic Employees of Library of Congress* and *Ray*, Plaintiff has not asserted a First  
15 Amendment violation that is distinct from his claim that he suffered employment discrimination  
16 and retaliation based on his religion. The conduct that forms the basis of Plaintiff’s First  
17 Amendment claim is the same conduct that Plaintiff alleges was retaliatory and discriminatory. At  
18 the hearing, Plaintiff’s counsel confirmed that Paragraph 71 of the SAC crystallizes Plaintiff’s  
19 First Amendment claim. Paragraph 71 alleges that Plaintiff was “subjected to investigation and  
20 interrogation regarding his religious faith and practices by the Agency” when his employer  
21 inquired about his religious faith and practices that he engages in outside of his employment and  
22 suggested that he should not be engaging in religious practices central to his faith. SAC at ¶ 71.  
23 This is the same conduct described in his retaliation claim wherein he states that he was  
24 interrogated by his supervisor about “his religious activity of baptizing an individual” a week after  
25 he inquired about the Agency’s policy regarding reading religious materials. SAC at  
26 ¶¶ 57-58. Indeed, Plaintiff’s First Amendment claim “repeats” and “re[-]alleges” all facts  
27 supporting his Title VII claims, which further demonstrates that his First Amendment claim is  
28 based on the same conduct or wrongs as his Title VII claims.

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Applying Nolan, Plaintiff's First Amendment is therefore precluded by Title VII. Defendant's motion to dismiss Plaintiff's First Amendment claim is granted. As Plaintiff has already had an opportunity to amend his First Amendment claim to address this deficiency, the court finds that further attempts at amendment would be futile, and therefore dismisses Plaintiff's First Amendment claim with prejudice.

**IV. CONCLUSION**

For the reasons set forth above, Defendant's motion is **GRANTED**. Plaintiff's First Amendment claim is dismissed with prejudice. Defendant's request for judicial notice of the Final Agency Decision [Ex. A to Docket No. 30] is denied as moot.

**IT IS SO ORDERED.**

Dated: January 3, 2017

