Discrimination against Muslims and people of Middle Eastern descent (or people perceived to be Muslim or of Middle Eastern descent) pre-dates the September 11, 2001 attacks, but the harassment and violence perpetrated against them in the aftermath of that event has brought the contours of this bias into sharper relief. Federal employment discrimination caselaw shows that a peculiar conflation of race, ethnicity, national origin, religion, and culture is often the hallmark of post-9/11 discrimination. The muddled nature of this bias creates an added layer of complication for plaintiffs seeking relief for such discrimination through traditional civil rights laws, which were already unclear on the proper definition and treatment of race versus national origin claims. As some commentators have noted, in this post 9-11 era, “Islamic

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1 E.g., Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 609, 614 (1987) (Brennan, J. concurring) (noting that under Title VII, “national origin claims have been treated as ancestry or ethnicity claims in some circumstances”); Sinai v. New Eng. Tel. & Tel. Co., 3 F.3d 471, 475 (1st Cir. 1993) (“Race and national origin discrimination may present identical factual issues when a victim is born in a nation whose primary stock is one's own ethnic group” and thus “may overlap” (quotations omitted)); Daemi v. Church’s Fried Chicken, Inc., 931 F.2d 1379, 1387 n.7 (10th Cir. 1991) (“the line between national origin discrimination claims under Title VII and racial discrimination claims under [42 U.S.C. § 1981] is not a bright one” (quotations omitted)); Bullard v. OMI Ga., Inc., 640 F.2d 632, 634 (5th Cir. Unit B 1981) (“In some contexts, national origin discrimination is so closely related to racial discrimination as to be indistinguishable”); Adames v. Mitsubishi Bank, Ltd., 751 F. Supp. 1548, 1559 (E.D.N.Y. 1990) (“the line between discrimination on account of race and discrimination on account of national origin may be so thin as to be indiscernible”).
religious difference has been racialized in the context of the war on terror.”² Anecdotal evidence compiled by the Council on American-Islamic Relations about the nature of civil rights complaints illustrates this point. Of the total 2467 civil rights-related complaints that it received in 2006, CAIR found that roughly 52% appeared to be have been prompted by the perceived ethnicity or religion of the victim.³

Commentators contend that traditional antidiscrimination jurisprudence is often inadequate in acknowledging, let alone redressing such “religiously driven racial discrimination.”⁴ Courts have had to revisit the hazy boundary between race and national origin, as well as consider the potential overlap between these categories and religion. Decisions do not reveal any consistent pattern in how judges will treat claims that reflect an amalgamation of these concepts. As a general matter, though, plaintiffs’ lawyers should remember that the basic rules of thumb applicable to discrimination cases generally are particularly important when the dispute concerns a form of discrimination that does not fit traditional conceptions of a racial epithet, ethnic stereotype, or religious bias.⁵

A. The Intersection of Race and National Origin

Title VII of the Civil Rights Act of 1964 “prohibits employment discrimination based on race, color, religion, sex and national origin.”⁶ The Supreme Court has interpreted Title VII’s use of the term “national origin” as referring “to the country where a person was born, or, more

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³ “Muslim-sounding names” and cultural or religious activists or organizations constituted the next two largest targets of harassment.
⁵ Section C infra.
broadly, the country from which his or her ancestors came."7 EEOC Guidelines define national origin discrimination “broadly, as including, but not limited to, the denial of equal employment opportunity because of an individual’s, or his or her ancestor’s, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.”8

While Title VII proscribes both race and national origin discrimination, in Saint Francis College v. Al-Khazraji, the Supreme Court held that Section 1981 of the Civil Rights Acts of 1866 gives individuals a private right of action for discrimination in the making of public and private contracts, if the discrimination is based on race.9 However, in determining whether a given claim describes the type of conduct prohibited by Section 1981, the relevant inquiry is not whether “it would be classified as racial in terms of modern scientific theory.”10 Since informal notions and social science definitions of “race” have changed over time, the guiding principle in understanding Section 1981’s breadth is Congress’s intent when the statute was passed – “to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.”11

Some courts have read Al-Khazraji to mean that Section 1981 protects against race discrimination but not national origin discrimination.12 Other courts have viewed the decision as

8 29 C.F.R. § 1606.1.
9 481 U.S. 604, 609, 613 (1987). Section 1981 guarantees to all persons within the jurisdiction of the United States “the same right in every State and Territory to make and enforce contracts, to sue, … and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.” 42 U.S.C. § 1981.
10 Al-Khazraji, 481 U.S. at 613.
11 Id.
12 E.g., Von Zuckerstein v. Argonne Nat’l Lab., 984 F.2d 1467, 1472 (7th Cir. 1993) (“claims founded on that status are not cognizable under [S]ection 1981, which is designed to remedy discrimination based on race or ethnicity”); Roach v. Dresser Indus. Valve & Instrument Div., 494 F. Supp. 215, 216 (W.D. La. 1980) (“[Section 1981’s] legislative history enunciates precisely that a person’s national origin has nothing to do with color, religion, or race”).
holding that national origin discrimination may be actionable under the statute, but only if race discrimination is also implicated in the complaint. Thus, when bringing claims under Section 1981, plaintiffs must be sure to plead facts and allegations that would show that he or she was discriminated against “because of their ancestry or ethnic characteristics” and not based “solely on the place or nation of his origin, or his religion.” Otherwise, plaintiffs risk having their claims dismissed for failure to state a claim or losing on the merits. Although “courts have warned that ‘an attempt to make … a demarcation [between race and national origin claims] before both parties have had an opportunity to offer evidence at trial is inappropriate,’” courts have varied in their willingness to explore a plaintiff’s allegations. As a result, courts sometimes have reached inconsistent conclusions when presented with the same or comparable questions about what constitutes a viable race versus national origin claim.

For example, when asked how to characterize allegations of discrimination based on a plaintiff’s Iranian heritage, the Seventh and Eighth Circuits have provided starkly different answers. In Zar v. South Dakota Board of Psychologists, the Eighth Circuit concluded that discrimination targeting Iranian ancestry did not constitute actionable discrimination under Section 1981. The Court of Appeals affirmed summary judgment for the defendant on the

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13 E.g., Amiri v. Hilton Wash. Hotel, 360 F. Supp. 2d 38, 43 (D.D.C. 2003) (“National origin discrimination is cognizable under § 1981 only when based on racial or ethnic characteristics associated with the national origin in question.”) (quotations and citation omitted); Sinai v. New England Tel. & Tel. Co., 3 F.3d 471, 475 (1st Cir. 1993) (“national origin discrimination could be used, together with other evidence, to arrive at a conclusion vis-a-vis race discrimination”).

14 Al-Khazraji, 481 U.S. at 613.

15 As a procedural matter, courts most often discuss whether a claim pertains to race or national origin discrimination in the course of reviewing a defendant’s motion to dismiss for failure to state a claim, motion for summary judgment, or in the case of Title VII claims, motion to dismiss for failure to exhaust administrative remedies (i.e., the claim was not pled in the EEOC charge).

16 Deravin v. Kerik, 335 F.3d 195, 202 (2d Cir. 2003) (quoting Bullard v. Omi Georgia, Inc., 640 F.2d 632, 634-35 (5th Cir. 1981)).
grounds that the plaintiff’s claim was premised “only on the fact that he is Iranian.”17 The court failed to engage in any discussion of what being “Iranian” signified or the nature of the allegedly discriminatory conduct. Instead, the court noted simply that, at oral argument, “when asked whether Dr. Zar was an Arab, [counsel] responded ‘I can't tell you, your Honor.’”18 On this basis alone, the court concluded the plaintiff had failed to state a Section 1981 claim.

The Seventh Circuit’s brief but insightful discussion in the more recent *Abdullahi v. Prada USA Corporation* decision resulted in the opposite finding.19 In *Abdullahi*, the pro se plaintiff, who also was of Iranian descent, sued her employer for employment discrimination under Section 1981. She commenced the action using a standardized complaint form provided by the courts to pro se plaintiffs and identified her claims as based on race, national origin, and religious discrimination. However, in an amended complaint, the plaintiff identified the case as concerning only national origin and religious discrimination.20 Based on the amended pleading, the lower court dismissed the national origin claim on the grounds that Section 1981 only protects against race discrimination. The Seventh Circuit Court of Appeals reversed, after first recalling the conceptual and evidentiary overlap among claims of race, color, and national origin discrimination.21 The court then observed that, with respect to the claims presented, hostility toward someone who was Iranian could be motivated by politics (“hostility to an Iranian [might] be based on the fact that Iran is regarded as an enemy of the United States”22) or by racial animosity (“[s]ome Iranians, especially if they speak English with an Iranian accents, might, though not dark-skinned, strike some Americans as sufficiently different looking and sounding

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17 976 F.2d 459, 467 (8th Cir. 1992).
18 *Id.*
19 520 F.3d 710 (7th Cir. 2008).
20 *Id.* at 711.
21 *Id.* at 712.
22 *Id.*
from the average American of European ancestry to provoke the kind of hostility associated with racism”

). As for the latter, the court commented that while a conclusion that the complained-of conduct was motivated by racial animus rested on a very “loose” understanding of the term “race,” it was appropriate to attribute such a broad conception of the term to “a race statute passed in 1866.”

In Abdullahi, the Court of Appeals also based its ruling on an earlier decision, Pourghoraishi v. Flying J., Inc., in which it held that, with respect to discrimination claims based on Iranian ancestry, “national origin and race coincide.” In Pourghoraishi, the court considered whether a plaintiff stated a claim for race or national origin discrimination when he alleged that discrimination because he was Iranian. Although the Supreme Court in Al-Khazraji had concluded that differential treatment based on Arab ancestry was within the scope of Section 1981’s safeguards, the plaintiff in Pourghoraishi testified, and the Court of Appeals agreed, that Iran is a non-Arab country and that Iranians are often classified as part of the Caucasian or Aryan race. Noting the Supreme Court’s admonitions that “definitions of race that require distinctive physiognomy, or strict adherence to taxonomical, biological or anthropological definitions” have no bearing on whether a particular group is protected by Section 1981 and that race ought to be broadly defined for purposes of that statute, the court concluded that treatment

23 Id.
24 Id.
25 449 F.3d 751 (7th Cir. 2006).
26 Abdullahi, 520 F.3d at 712.
27 Al-Khazraji, 481 U.S. at 612-13 (“If respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under § 1981”).
28 Pourghoraishi, 449 F.3d at 757.
based on an individual’s Iranian background constituted actionable discrimination under the Section 1981.\textsuperscript{29}

The Seventh Circuit’s approach comports with the view expressed by other courts that a plaintiff’s failure “to expressly allege race discrimination or use terms suggestive of a potential confusion between the concepts of race and nationality” should not, by itself, be a fatal defect in pleading.\textsuperscript{30} Rather, “[it is the substance of the charge and not its label that controls.”\textsuperscript{31} As such, in cases where the allegations underlying a national origin claim in fact reflect a racial or ethnic animus, courts have often treated these claims as properly pled.\textsuperscript{32}

Notwithstanding the oft-repeated concerns about the confluence of national origin and race and the need for a broad understanding of what is a protected category under Section 1981, not all courts have delved beyond a formalistic review of such claims, even in the post-9/11 context. In \textit{El-Zabet v. Nissan North America, Inc.}, the Sixth Circuit Court of Appeals addressed a Section 1981 suit that was characterized as a national origin discrimination action.\textsuperscript{33} The court

\textsuperscript{29} \textit{Id.}
\textsuperscript{30} \textit{Deravin v. Kerik}, 335 F.3d 195, 201 (2d Cir. 2003). The Second Circuit in \textit{Deravin} was discussing whether the plaintiff’s race discrimination claim was “reasonably related” to his national origin discrimination claim. The plaintiff had failed to specifically allege race discrimination in his EEOC charge, which was fashioned only as a national origin complaint. The court’s reasoning is nevertheless instructive in the Section 1981 context since the “reasonably related” analysis is essentially the “loose pleading” requirement applicable to federal court claims, including Section 1981 actions. \textit{Id.} at 202.
\textsuperscript{32} \textit{E.g., Khan v. United Recovery Sys.}, CIVIL NO. H-03-2292, 2005 U.S. Dist. LEXIS 4980 (S.D. Tex. Feb. 28, 2005) (“when a plaintiff asserts that he has suffered discrimination based on his membership in a group that is commonly perceived as racial because it is ethnically and physiognomically distinct, we will treat the case as asserting a claim under § 1981 whether he labels that discrimination as based on "national origin" or on "race" (quoting \textit{Jatoi v. Hurst-Euless-Bedford Hosp. Auth.}, 807 F.2d 1214, 1218 (5th Cir. 1987)); \textit{accord In re Rodriguez}, 487 F.3d 1001 (6th Cir. 2007) (treating race discrimination claim brought under state civil rights law as national origin claim, given nature of allegedly discriminatory conduct).
\textsuperscript{33} No. 05-6729, 2006 U.S. App. LEXIS 31713 (6th Cir. Dec. 22, 2006).
found that the plaintiff failed to state a claim, focusing on the facts that the complaint did not mention race, stated that the plaintiff “is of Middle Eastern origin, which is a member of the protected classes of citizens under Title VII,” and described the Section 1981 claim as arising from “harassment and discrimination on the basis of national origin.” Yet the factual allegations in the complaint reflected an animosity that targeted race, ethnicity, and ancestry, not just national origin. As noted by the court in its discussion of the plaintiff’s Title VII claims, the allegedly discriminatory conduct included “racially charged insults” such as “camel jockey” and “sand nigger,” “inflammatory comments about politics in the Middle East (such as a statement on September 11, 2001, that ‘we need to nuke all those people in the Middle East’), and, … an e-mail including a fictional police report referring to El-Zabet as a ‘possible Arab terrorist.’” The court did not mention these allegations in its discussion of the plaintiff’s Section 1981 claims, recounting them only in its review of his Title VII hostile work environment claim (which also was based on national origin discrimination). Why the court ignored these comments in its review of the national origin claim is unclear since a factfinder may consider the aggregate evidence of different forms of discrimination in ruling on a plaintiff’s claims. Moreover, courts...

\[34\] Id. at *3.
\[35\] Id. at *3-4 (alterations in original).
\[36\] Id. at *10.
\[37\] Id. at *11. Although the court found these incidents to be unactionable under Title VII because they were beyond the limitations period, id., the timeliness issue does not undermine the fact that they could, as a substantive matter, support a claim for discrimination based on ethnicity or ancestry under Section 1981.

\[38\] E.g., El-Hakem v. BJY, Inc., 415 F.3d 1068, 1073 (9th Cir. 2005) (employer’s practice of referring to plaintiff as “Manny” or “Hank” instead of his given, Arabic name, while not racial epithets, constituted race-based conduct sufficient to state race discrimination claims under Title VII and Section 1981; “[a] group’s ethnic characteristics encompass more than its members’ skin color and physical traits [and that] names are often a proxy for race and ethnicity”); Sinai v. New Eng. Tel. & Tel. Co., 3 F.3d 471, 475 (1st Cir. 1993) (finding of race discrimination may be based on evidence of national origin bias plus evidence of other types of discrimination); Salem v. Heritage Square, Inc., No. C 06-04691, 2007 U.S. App. LEXIS 67493, at *24-25 (N.D. Cal. 2007).
in other Circuits have found that such comments reflect a discriminatory animus based on ethnicity or ancestry and, therefore, constitute acts prohibited by Section 1981.39

B. The Intersection of Religion and National Origin

In addition to reviewing the nexus between national origin and race claims, in the post-9/11 context, courts are increasingly asked to address the relationship between national origin and religious discrimination. Drawing on cases recognizing the intersection of race and national origin, courts have found that national origin and religion may similarly coincide. For example, in Sasannejad v. University of Rochester, the defendant challenged the plaintiff’s Title VII religious discrimination claim on the grounds that it had not been pleaded in his EEOC charge, which the plaintiff labeled a national origin charge.40 Although the court ultimately granted the defendant’s motion for summary judgment on both claims, it rejected the defendant’s contention that the plaintiff had failed to exhaust administrative remedies for its religious discrimination claim.

Sept. 4, 2007) (denying employer summary judgment in sex, race, and religious discrimination case even though plaintiff’s gender harassment case was “arguably weak,” because combined evidence of different kinds of discrimination could support finding that work environment was hostile).

39 E.g., Mustafa v. Clark County Sch. Dist., 157 F.3d 1169, 1180 (9th Cir. 1998) (plaintiff stated claim under Section 1981 based on supervisor’s “demand[ for] an explanation for Palestinian support of Saddam Hussein”; supervisor’s comment that “maybe a camel stepped on [plaintiff’s] foot,” after plaintiff returned from a trip to Middle East with an injury; statements by plaintiffs’ fellow teachers that supervisor expressed an “ethnic bias” against plaintiff; and supervisor continuously alluded plaintiff’s Palestinian origin without reason); Hussein v. Regents of the Univ. of Colo., 03-cv-02180, 2006 U.S. Dist. LEXIS 60724 (D. Colo. Aug. 25, 2006) (given overlap between national origin and race discrimination, Section 1981 claim “based on the fact that [plaintiff] is an Arab” may proceed even though plaintiff stated in deposition that he was “fired because of his national origin and for no other reason”; claim dismissed on other grounds); Saeed v. The Warner-Lambert Co., No. 3:00-cv-197 (PCD), 2007 U.S. Dist. LEXIS 27355, at *8 (D. Conn. May 10, 2002) (finding allegedly discriminatory remarks that “invoke[d] notions of family, wealth, religion, [and] social status” actionable under Section 1981 because “[i]t is not apparent, given the range of statements here involved, that the statements are limited to plaintiff’s national origin and do not implicate his ethnicity”).

The parties in *Sasannejad* agreed that the plaintiff had marked the line for national origin discrimination but not the line for religious discrimination on his EEOC charge form. However, the court noted that the plaintiff believed that designating the claim as based on national origin would be sufficient to identify the claim as also concerning religious discrimination. The plaintiff was a non-practicing Muslim born in Iran and, according to him, “national origin was a broader, ‘more general term’ because most Iranians are Muslims.”41 Observing that claims not presented in an EEOC charge may still be litigated in federal court if the omitted claim is “reasonably related” to those pled before the agency, the court considered the nebulous nature of national origin claims. “A claim based on national origin discrimination is theoretically different from a claim based on religious or racial discrimination. Nevertheless, in certain circumstances, the two claims may be so interrelated as to be indistinguishable.”42 The court found that Sasannejad’s claim of national origin discrimination based on an Iranian heritage was precisely one such circumstance. Acknowledging that Iran is an Islamic Republic with a 98% Muslim population, the court concluded that “the line between discrimination based on Iranian national origin and the Islamic religion appears to be sufficiently blurred and the claims are reasonably related to one another.”43 Other courts have also adopted the view that the overlap between national origin and religious discrimination claims warrants a close analysis of the allegations.

41 *Id.* at 389 (quoting deposition testimony).
42 *Id.* at 391.
43 *Id.* Although the court did not provide details of the content of the plaintiff’s actual EEOC charge, it appears that it contained allegations evincing concerns that he was targeted due to a religious animosity, which further reinforced the court’s finding that the two claims were sufficiently related. *Id.* (“based on the content of plaintiff’s EEOC charge questionnaire and follow-up letter, it stands to reason that, while investigating whether [the employer] discriminated against plaintiff because he is originally from Iran, the EEOC would also investigate whether [the employer] discriminated against plaintiff because he is a Muslim.”)
and evidentiary record, much like the approach some courts have followed in the face of intersecting race and national origin claims.\textsuperscript{44}

Accordingly, in \textit{Butler v. MBNA Technology}, the Fifth Circuit Court of Appeals considered what relationship, if any, incidents reflecting religiously-based animus had to harassment evincing a national origin bias.\textsuperscript{45} The events in question consisted of racial or ethnically-based comments (including statements that Iranians were “crazy,” “smelled bad,” “put dirty laundry on their heads,” and “take hostages”), as well as one incident in which a picture of Taliban leader Mullah Mohammed Omar was posted in the office.\textsuperscript{46} The court found that the objectionable remarks, which were made outside the limitations period, “involved discrimination based specifically on [the plaintiff’s] Iranian national origin or, in one case, on her being of Middle Eastern descent.”\textsuperscript{47} In contrast, the court construed the posting of the picture to be a form of religious harassment in that the plaintiff was not Afghani, was not affiliated with the Taliban, and had argued it was offensive for its misrepresentation and stereotyping of Muslim tenets. In finding that these ostensibly different forms of alleged discrimination were “sufficiently similar” to constitute a continuing violation (if certain other criteria were met), the

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\textsuperscript{44} E.g., \textit{EEOC v. NCL Am., Inc.}, 535 F. Supp. 2d 1149, 1164 (D. Haw. 2008) (discussed \textit{infra}); \textit{Sulieman v. Roswell Park Cancer Inst.}, 05-CV-0766A, 2007 U.S. Dist. LEXIS 46599 (W.D.N.Y. June 27, 2007) (finding plaintiff satisfied administrative prerequisites for national origin and religious discrimination claims even though EEOC charge was labeled only as race discrimination complaint because 97% of Iraqi population is Muslim and because of overlap between bias targeting plaintiff’s Iraqi national origin and bias targeting his Muslim religious); \textit{Salami v. N.C. Agric. & Tech. State Univ.}, 394 F. Supp. 2d 696, 717 n.8 (M.D.N.C. 2005) (“While Plaintiff has presented negligible evidence that any discriminatory animus was based upon his religion, the Court is convinced by the reasoning in \textit{Sasannegad} … [that], in certain circumstances, the two claims ‘may be so interrelated as to be indistinguishable.’” (quoting \textit{Sasannegad})).

\textsuperscript{45} No. 04-10058, 2004 U.S. App. LEXIS 20132 (5th Cir. Sept. 24, 2004).

\textsuperscript{46} \textit{Id.} at *2-3, 7.

\textsuperscript{47} \textit{Id.} at *8.
court “assume[d] that Islam is the dominant religion of Iran and the Middle East in general, and that the religion is often closely associated with the region in American popular perception.”

Notably, the Butler court framed the incident involving the Mullah Omar picture as a case of religious discrimination in part because it did not concern the plaintiff’s true country of origin. Cases involving post-9/11 discrimination often reflect a misidentification of the victim’s race, ethnicity, national origin, or religion. However, the fact that, in the words of one court, “defendants may be poor anthropologists” should not be fatal to a plaintiff’s discrimination claims.

In EEOC v. WC&M Enterprises, Inc., the EEOC brought suit on behalf of an Indian-born Muslim male against his former employer for national origin and religious discrimination. The complaint alleged that, after September 11, 2001, co-workers and managers began harassing him by, among other things, referring to him as “Taliban” or “Arab,” mocking his dietary customs, and making other comments referencing, often incorrectly, his religion and national origin. In reversing the lower court’s grant of summary judgment to the employer, the Fifth Circuit Court of Appeals rejected the defendant’s contention that the alleged harassment was not actionable because it did not refer to the fact that the complaining employee was from India. Citing the EEOC guidelines on the definition of national origin discrimination, the court held that “a party is able to establish a discrimination claim based on its own national origin even though the discriminatory acts do not identify the victim’s actual country of origin.”

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48 Id.
49 Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 971 (10th Cir. 1979) (addressing Section 1981 claims).
50 496 F.3d 393 (5th Cir. 2007).
51 Id. at 401; but see Hussain v. Highgate Hotels, Inc., No. 03-2373, 2005 U.S. App. LEXIS 4526 (6th Cir. Mar. 18, 2005) (finding co-worker’s comment that “he did not understand why the United States did not just drop an atomic bomb on Afghanistan” not to be actionable act of
Relatively, in *EEOC v. NCL America, Inc.*, the defendants sought dismissal of the religious discrimination claims not because they had misidentified the plaintiff’s faith, but because there was “no evidence that Defendants knew that Plaintiffs-Intervenors were Muslim or, indeed, had any religious affiliation.”52 The plaintiffs-intervenors were employed on a cruise ship in 2004 when the employer began investigating “Middle Eastern employees” after a worker “allegedly observed a Middle Eastern coworker appear angry, make disparaging remarks about Americans, state that he would be joined by friends soon, and ask about restricted areas of the ship.”53 After the internal inquiry and an investigation by the FBI concluding that the plaintiffs-intervenors posed no security threat, defendants nevertheless discharged the targeted employees. In rejecting the defendants’ contention that they could not have discriminated against the plaintiffs-intervenors because they did not know the employees’ religious faith, the court observed that, “[i]n this post-September 11 world, national origin and religion have often become conflated in media reports, especially with regard to issues of terrorism. … It would thus not be surprising if Defendants inferred that Plaintiffs-Intervenors were Muslim based on their Yemeni origin.”54

**C. Practice Pointers**

With inevitable changes in U.S. demographics and the uncertainty of world events, the face of discrimination and its victims in the coming years is unclear. While the cases discussed here deal specifically with the post-9/11 discrimination cases, their impact is on employment discrimination jurisprudence generally. If anything, they are good reminders

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53 Id. at 1157.
54 Id. at 1164.
about the need to go back to basics in any kind of litigation – but particularly when dealing with issues that are novel or, at least, deviate from the norm. For plaintiffs’ lawyers, the following practice pointers can be drawn from the cases cited above.

**Rule 1: Educate yourself, the court, and your opponent.** To varying degrees, courts and civil rights enforcement agencies are willing to acknowledge the broader social and political context in which discrimination claims are brought. Plaintiffs’ lawyers must spend time learning about and explaining the connections between race, national origin, and religion with respect to a plaintiff’s actual identity or an individual’s perceived identity or common stereotypes.

**Rule 2: Start with a solid foundation.** Whether before the EEOC or federal court, pay close attention to your pleadings. Cases that may have viable claims can be thrown out for inartful or careless allegations. Go back and make sure you are discussing race in a race case, or national origin in a national origin case. If your case involves both or some hodgepodge of those and other protected categories, be sure to explain everything that is involved.

**Rule 3: Help “connect the dots.”** Use experts or ask that the court take judicial notice of salient facts. As in any case, give the decisionmaker all the tools necessary to reach the conclusion for which you are advocating.
Rule 4: Tackle “bad” precedent. Older cases may reflect a lack of understanding about a particular ethnic group or nationality, or unfamiliarity with the way in which they experience discrimination. Additionally, cases presenting similar allegations and disputes have resulted in radically different outcomes both across and with Circuits. Because discrimination cases are so fact-specific, pay close attention to how your case may be distinguished from prior rulings.

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