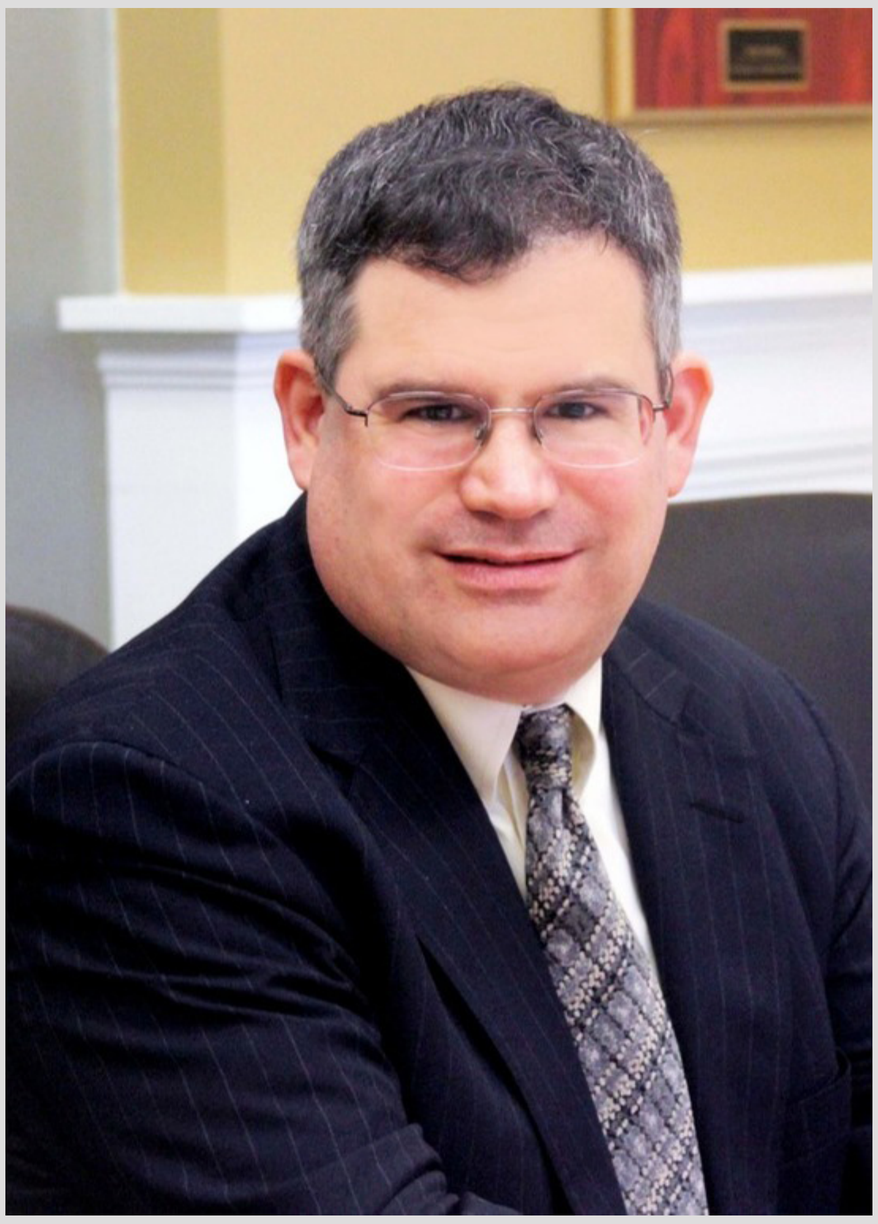
A Remembrance of

JOSEPH J. VITALE '89
MARC A. TENENBAUM



and the Celebration of the Creation of the Joseph Vitale '89 Labor Fellowship

Tuesday, October 11, 2022
5:30 - 8:15 p.m.

Fordham Law School
Costantino Room

CLE COURSE MATERIALS

FORDHAM UNIVERSITY
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The Rat, The First Amendment, Workers' Speech and the Future
Speaker Bios

Professor Kate Andrias
Professor of Law, Columbia
Kate Andrias teaches and writes in the fields of constitutional law, labor law, and administrative law. Her scholarship probes the failures of U.S. law to pro-tect workers' rights, examines the efforts of historical and contemporary work-er movements to transform legal structures, and analyzes how labor law and constitutional governance might be reformed to enable greater political and economic democracy. Drawing from constitutional law, administrative law, and legal history perspectives, she also has explored the relationship between law and the perpetuation of economic inequality. She frequently provides advice on policy initiatives to legislators and workers' rights organizations and works on related litigation.

Prior to law school, Andrias worked for several years as an organizer with the Service Employees International Union. After receiving a J.D. from Yale Law School, she clerked for Judge Stephen Reinhardt of the U.S. Court of Appeals for the 9th Circuit and for Justice Ruth Bader Ginsburg '59 on the U.S. Supreme Court. Andrias practiced political law at Perkins Coie and served as associate counsel and special assistant to President Barack Obama and as chief of staff in the White House Counsel's Office.

She joined the faculty of Michigan Law School in 2013 and was the recipient of Michigan Law School's L. Hart Wright Award for Excellence in Teaching in 2016. She joined the faculty of Columbia Law School in 2021 and also has served as an academic fellow at Columbia Law School and taught American Constitutional Law as a visiting professor at L'Institut d'Études Politiques

(Sciences Po) in Paris. Andrias served as a commissioner and the rapporteur for the Presidential Commission on the Supreme Court and sits on the Board of Academic Advisors of the American Constitution Society.

Professor James Brudney
Chair in Labor and Employment Law, Fordham University
James Brudney joined the Fordham faculty after nineteen years at The Ohio State University Moritz College of Law, where he was Newton D. Baker-Baker & Hostetler Chair in Law. Following graduation from law school, Professor Brudney clerked for the Honorable Gerhard A. Gesell of the U.S. District Court in Washington, D.C. and then for Justice Harry A Blackmun of the United States Supreme Court. He was associated for four years with the firm of Bred-hoff and Kaiser in Washington, representing individuals and unions in consti-tutional and statutory matters.

Professor Brudney served for six years as Chief Counsel and Staff Director of the U.S. Senate Subcommittee on Labor. He has been Adjunct Professor of Law at the Georgetown Law Center and Visiting Professor of Law at Harvard Law School. At Fordham, Professor Brudney principally teaches Labor Law, Employment Law, and Legislation and Regulation. His scholarly writing is in the areas of workplace law and statutory interpretation.

Professor Brudney is co-chair of the Public Review Board for the United Auto Workers International Union, and is a member of the Committee of Experts of the International Labor Organization. He received a Fulbright Distinguished Scholar Award to do research and lecturing at Oxford University in the

Fall of 2000. In 2008, he received an Alumni Award for Distinguished Teaching from the Ohio State University. In 2014, he was selected as Professor of the Year by Fordham Law School Students.

Professor Chaumtoli Huq
Associate Professor of Law, CUNY
Chaumtoli Huq is an Associate Professor of Law at CUNY School of Law and the founder/Editor of an innovative law and media non-profit focused on law and social justice called Law@theMargins. Her expertise lies in labor and em-ployment, and human rights. Professor Huq has devoted her professional ca-reer to public service focusing on issues impacting low-income New Yorkers. In 2014, she was appointed as the General Counsel for Litigation for the New York City Office of the Public Advocate, becoming then the highest-ranking Bangladeshi-American in New York City government, for which she received a New American Heroes award from the New American Leaders Project. Along with holding leadership roles at Legal Services of NYC and MFY Legal Services, she also served as Director of the first South Asian Workers' Rights Project at the Asian American Legal Defense and Education Fund, the first staff attorney to the New York Taxi Workers Alliance, and has served Community Board 7 for the Upper West Side.

Hanan B. Kolko
Partner, Cohen Weiss
Hanan B. Kolko joined the firm in March 2019 and became a Partner in January 2021. Mr. Kolko practices in the area of labor and employment law. He represents labor unions in federal and state court litigation, arbitration proceedings, administrative proceedings before various regulatory agencies, and in collective bargaining. Mr. Kolko also advises unions and their leaders on internal union governance, the investigation and handling of sexual harassment claims, and internal union elections. He has represented unions in a wide variety of industries including publishing, media, education, health care, law enforcement, transportation, and manufacturing.

Prior to joining Cohen, Weiss and Simon LLP, Mr. Kolko was a partner at two major union-side firms in New York City, and began his career as a lawyer as an associate at union-side firms in Cleveland, Ohio and Detroit, Michigan. While in law school, Mr. Kolko was a law clerk for the United Auto Workers. His first experience working with unions was while he was in college, where he was an intern for the Rochester, New York PATCO local. He is a graduate of the Cornell University School of Industrial and Labor Relations and a cum laude graduate of the University of Michigan Law School, where he received the Book Award for the highest grade in his labor law class.

Mr. Kolko is a former co-chair of the American Bar Association's Section on Labor and Employment Law Committee on Technology in the Workplace, and is an Advisory Board Member of Cornell University's School of Industrial and Labor Relations. He has given continuing legal education presentations on a wide variety of labor law topics to groups including the AFL-CIO Lawyers Coordinating Committee, the American Bar Association's Section on Labor and Employment Law Committee on Technology in the Workplace, and the Practicing Law Institute.

He has been named a Super Lawyer for Employment and Labor Law on the New York Metro Annual Lists of Super Lawyers from 2012-2020.Mr. Kolko also represents clients in the cannabis industry. He advises these clients in areas including licensing applications, regulatory compliance, internal investigations, and in litigations. He has lectured extensively on cannabis law issues, giving presentations on issues including legal ethics and the representation of cannabis clients, bankruptcy and the cannabis industry, the

current state of legal affairs in the cannabis industry, RICO claims against cannabis industry participants, and the New York State Compassionate Care Act.

The Rat, The First Amendment, Workers' Speech, and The Future

Written Continued Legal Education Materials

October 11, 2022

I. Introduction

In 1947 and 1959, Congress amended the National Labor Relations Act ("NLRA" or the "Act") to limit a union's ability to exert economic pressure on secondary employers. A "secondary" or "neutral" employer is an entity *other than* the employer with whom the union has a labor dispute (the "primary" employer). In general, although unions may engage in handbilling and bannering to pressure a neutral employer to cease doing business with a primary employer, they cannot engage in picketing for the same purpose. Part II details the relevant Supreme Court decisions creating this distinction. In Part III, attention is turned to a related issue: whether the NLRA's limits on secondary activity prohibit unions from displaying "Scabby the Rat"—a large inflatable rat, and a long-used symbol for labor rights—to pressure a neutral employer. This type of secondary activity has been approved by both the lower federal courts and National Labor Relations Board ("NLRB" or the "Board"), and recent attempts to reverse course have been rejected in both forums.

II. Picketing and Handbilling at Secondary Sites

A. Statutory Background

Section 8(b)(4)(ii) makes it an unfair labor practice to "threaten, coerce, or restrain," with an object proscribed in subsection (A), (B), (C), or (D), "any person engaged in commerce." Subsection (B), the most common provision at issue, proscribes "forcing or requiring any person to cease . . . doing business with any other person." Reading these sections

together, it is an unfair labor practice to threaten or coerce a secondary employer to cease doing business with a primary employer. *Preferred Bldg. Servs., Inc.*, 366 NLRB No. 159 (2018).

The key issue is whether the union's conduct—handbilling, bannering, picketing, *etc.*—is "threatening" or "coercive" within the meaning of Section 8(b)(4)(ii). If it is, the union cannot engage in that behavior to place economic pressure on a neutral employer.[1]

B. Secondary Picketing is Generally Not Protected

The lead case addressing secondary picketing under Section 8(b)(4)(ii) is *N.L.R.B. v. Retail Store Emp. Union, Local 1001* ("*Safeco*"), 447 U.S. 607 (1980). There, a union went on strike after contract negotiations with the employer (Safeco, a title insurance company) reached an impasse. *Id.* at 609. In addition to picketing Safeco's office in Seattle, however, the union also picketed five secondary employers with close business relationships to Safeco. *Id.* Safeco and one of the secondary employers filed complaints with the NLRB, and the Board concluded that the union's picketing violated Section 8(b)(4)(ii)(B). *Id.* at 610.

The Supreme Court agreed. In passing Section 8(b)(4)(ii)(B), Congress sought to prevent the use of secondary picketing to "persuade the customers of the secondary employer to cease trading with him in order to force him . . . to put pressure upon . . . the primary employer." *Id.* at 612. That is what, at least in the Supreme Court's view, the union did here. Because over 90% of the secondary employers' gross income derived from the sale of Safeco insurance, *id.* at 609, the union's picketing left consumers "no realistic option other than to boycott the title

[1] These materials do not address Section 8(b)(4)(i), which makes it an unfair labor practice to "induce or encourage," with an object proscribed in subsections (A), (B), (C), or (D), "any individual employed by any person engaged in commerce" to perform certain activities (*i.e.*, striking or otherwise refusing to work). This provision is targeted at secondary *employees*. Thus, under subsection (B), a union cannot engage in "picketing or other activity that induces or encourages the employees of a secondary employer to stop work, where an object is to compel that employer to cease doing business with the struck or primary employer." *Sw. Reg'l Council of Carpenters*, 356 NLRB 613, 615 (2011).

companies altogether." *Id.* at 613. The picketing was thus "reasonably calculated to induce customers not to patronize the neutral parties at all" and "simply [did] not square [with] the language or purpose of § 8(b)(4)(ii)(B)." *Id.* at 614-15.

The Supreme Court then considered whether this prohibition on secondary picketing violated the First Amendment. Although for different reasons, a majority of the Supreme Court said no. Four Justices found that secondary picketing "spreads labor discord by coercing a neutral party to join the fray" and that a "prohibition on picketing in further of such unlawful objectives" does not offend the First Amendment. 447 U.S. at 416. Similarly, in a separate concurrence, Justice Stevens found that the NLRA's limitations on secondary picketing were justified by Congress's interest in avoiding "embroil[ing] neutrals in a third party's labor dispute." *Id.* at 619. This was because picketing, unlike, for example, handbilling, "calls for an automatic response to a signal," rather than a "reasoned response to an idea." *Id.*[2]

Following *Safeco*, the Board has continued to find that secondary picketing is unlawful where the union seeks to pressure a neutral employer to cease doing business with a primary employer. *See Preferred Bldg. Services*, 366 NLRB No. 159 (2018) (picketing unlawful where there is evidence that it had the secondary object prohibited by Section 8(b)(4)(ii)(B)); *United Bhd. of Carpenters* ("*Eliason*"), 355 NLRB 797 (2010) ("Under our jurisprudence, categorizing peaceful, expressive activity at a purely secondary site as picketing renders it unlawful without any showing of actual threats, coercion, or restraint . . ."). Thus, the general

[2] *See also id.* at 617-18 (Blackmun, *J.*, concurring in the judgment) ("I am reluctant to hold unconstitutional Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.").

rule is that secondary picketing is prohibited by the NLRA and that this prohibition is consistent with the First Amendment.[3]

C. Secondary Handbilling is Generally Protected

Eight years after *Safeco*, in *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council* ("*DeBartolo*"), 485 U.S. 568 (1988), the Supreme Court reached the opposite conclusion regarding secondary handbilling. In *DeBartolo*, a union distributed handbills for three weeks outside a shopping mall, asking customers not to shop. *Id.* at 570-71. The handbilling was peaceful, and there was no picketing or patrolling. *Id.* at 571. The owner of the mall, a secondary employer, filed a complaint with the NLRB. The Board found that the union violated Section 8(b)(4)(ii)(B), reasoning that, when used to urge a consumer boycott, handbilling "inflict[s] economic harm on . . . secondary employers" and therefore is a "form of coercion" under the NLRA. *Id.* at 573.

The Supreme Court disagreed and reversed. Because the handbilling was peaceful and did not involve picketing or patrolling, the Board's statutory interpretation posed "serious questions" under the First Amendment. *Id.* at 575-76. To obviate these concerns, *id.* at 577, the Supreme Court concluded that the union's conduct did not constitute "threats, coercion, or restraint" under Section 8(b)(4)(ii). *Id.* at 578. More than "mere persuasion" is necessary to prove a violation. *Id.* Thus, because there was no "violence, picketing, or patrolling," the union's handbilling was merely an "attempt to persuade customers not to shop in the mall." *Id.* Losing customers because they read a handbill, in other words, is the "result of mere

[3] Although outside the scope of these materials, there is a narrow exception where the secondary picketing targets a specific product made by the primary employer, rather than the neutral employer's entire business, and there is marginal injury to the secondary employer. *See Safeco*, 447 U.S. at 612-13 (discussing *N.L.R.B. v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58 (1964)).

persuasion," and the secondary employer who reacts is "doing no more than what its customers honestly want it to do." *Id.* at 581.

DeBartolo makes clear that, under Section 8(b)(4)(ii)(B), a union can use handbilling to place economic pressure on a secondary employer. Although the Board argued that *Safeco* required a different result, the Supreme Court disagreed, following the distinction drawn in Justice Stevens' concurrence noted above. Because it is a "mixture of [both] conduct and communication," picketing is "qualitatively different from other modes" of expression. 485 U.S. at 580. The "conduct" element is the "most persuasive deterrent to third persons about to enter a business," and where, as in handbilling, that element is missing, Congress's specific concerns regarding picketing do not apply. *Id.*

III. Scabby the Rat

Two decades later, in its 2010 decision in *Eliason*, the Board followed the Supreme Court's lead in *DeBartolo* to reach a similar conclusion regarding bannering. In *Eliason*, union officials displayed a 15-foot banner on the sidewalk outside a secondary employer's business. 355 NLRB at 798. The Board clarified its approach under Section 8(b)(4) and held that, because there was no patrolling, no picket signs, and no interference with persons seeking to enter or exist the secondary employer's property, the union did not violate the Act by displaying the banner to persuade customers not to patronize the employer. *Id.* at 797.

The following year, in *Sheet Metal Workers Int'l Ass'n* ("*Brandon Regional Medical Center*"), 356 NLRB 1290 (2011), the Board addressed a similar issue: whether a union violates the NLRA by displaying Scabby the Rat outside a secondary employer's worksite. Relying on the framework developed in *Eliason*, the Board held that such conduct did not violate the Act. That decision, as well its fallout in the past decade, are addressed below.

A. Scabby Can be Used at Secondary Sites

In *Brandon Regional Medical Center*, in an attempt to persuade a hospital from doing business with a primary employer, a union placed an inflated rat balloon 100 feet from the hospital's front door. 356 NLRB at 1290. The rat was 16-feet tall and 12-feet wide. *Id.* Union members also distributed leaflets, and for two days, one member stood at the hospital's vehicle entrance and held the leaflet out with his arms. *Id.* The Board concluded that this conduct did not violate Section 8(b)(4)(ii)(B).

First, the Board found that the union did not violate the NLRA's plain language prohibiting conduct that is "threatening" or "coercive." *Id.* at 1291. The union was not violent, and it did not block ingress or egress onto the hospital's property. *Id.* Similarly, the legislative history did not suggest that Congress intended to prohibit these types of displays, which, like the bannering in *Eliason*, were stationary and peaceful. *Id.* The union's conduct thus did not fall within the Act's literal terms.

Second, the Board found that the union did not engage in unlawful picketing. Picketing, which involves "carrying . . . picket signs" and "persistent patrolling," can be coercive because it "creates a physical . . . [or] symbolic confrontation between the pickets and those entering the worksite." *Id.* at 1291. But no such "confrontation" was present here. The rat balloon was stationary, and it was located far enough from the entrance (100 feet) that visitors were not confronted with an actual or symbolic barrier as they arrived. *Id.* at 1292. In addition, the union members neither accosted hospital patrons nor "posted" themselves near the entrance in a way that could have been perceived as threatening. *Id.*

Third, the Board found that the union's conduct was not otherwise unlawfully coercive. Non-picketing conduct may be coercive if it could reasonably be expected to directly

cause a disruption to the secondary employer's operations. *Id.* at 1292. In a prior case, for example, this standard was met when a union hurled trash bags into a secondary employer's lobby. *Id.* (collecting cases). But that was not the case here. Instead, the union members were orderly, and they did not move, shout, impede access, or otherwise interfere with the hospital's business. *Id.* Further, although the rat balloon drew attention to the union's grievance and cast aspersions on the primary employer, the Board found "nothing in the location, size, or features of the balloon" that was likely to "frighten those entering the hospital . . . [or] disturb patients or their families. *Id.* The union's conduct was thus not coercive under Section 8(b)(4)(ii).

Finally, the Board found that a contrary holding would raise serious questions under the First Amendment. Several courts have held that the "use of a rat balloon to publicize a labor protest is constitutionally protected expression." *Id.* at 1293 (citing *Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005)). Thus, under the "constitutional avoidance" doctrine, Section 8(b)(4)(ii) should be read in a way to permit the union's conduct and preserve the provision's constitutionality. *Id.*

For these (and other) reasons, the Board concluded that Scabby the Rat may be used to pressure secondary employers to cease doing business with a primary employer. As discussed below, despite efforts to reverse the Board's decision, this remains good law.

B. Recent Attempts to Enjoin or Restrict Scabby's Use Have Been Rejected

In *King v. Constr. & Gen. Bldg. Laborers Local 79*, a union engaged in multiple secondary activities outside three supermarkets. 393 F. Supp. 3d 181, 185 (E.D.N.Y. 2019). These included: a regular display of a rat balloon and an inflatable cockroach on a public street; peaceful and limited handbilling; and a single, stationary, hourlong rally, where union members chanted and blew whistles. *Id.* at 185-88. After the supermarkets filed a labor charge, *id.* at 194,

the General Counsel ("GC") moved for a preliminary injunction in federal court under Section 10(l) of the Act. *Id.* at 195. The complaint alleged that the union's conduct violated Sections 8(b)(4)(i) and 8(b)(4)(ii) because the union intended to: (a) coerce the supermarkets' employees from working; and (b) persuade the supermarkets' customers from shopping. *Id.* at 197. At oral argument, the GC acknowledged that, by seeking this relief, it was arguing that *Brandon Regional Medical Center* "should be overturned." *Id.* at 203.

The court rejected this attempt to "depart from existing NLRB decisions." *Id.* As to the Section 8(b)(4)(ii) claim, there was no reasonable to cause to believe that the union's conduct was unlawful. *Id.* at 202. The union was not violent, it did not engage in picketing or patrolling, and there was no evidence that the leaflets or the inflatable animals had any coercive effect on customers. *Id.* Accordingly, because the union attempted only to "persuade," the union's conduct lacked the "essential element of coercion" and was permitted under the Act. *Id.*[4]

King thus rejected an attempt to undermine the Board's holding in *Brandon Regional Medical Center* that Scabby the Rat can be used to pressure secondary employers. But that was not the end of the matter. Just last year, in *Int'l Union of Operating Engineers* ("*Lippert Components*"), 371 NLRB No. 8 (2021), the Board invited briefing to resolve the issue of whether "the display of an inflatable rat and banners near the entrance to a neutral site" violates Sections 8(b)(4)(i) and (ii)(B). The Board specifically asked whether *Eliason* and *Brandon Regional Medical Center* should be modified or overruled.

[4] In denying the Section 8(b)(4)(i) claim, the court emphasized that there was no evidence that any of the supermarkets' employees refused to work or that any of the union members encouraged the employees to do so. In addition, the hourlong rally was not picketing (the members were stationary, and there was no attempt to confront the public by blocking the entrance to the parking lot), and the signs and leaflets did not call for employees to stop working. *See id.* at 198-201.

Ultimately, in a fractured decision, the Board affirmed the ALJ's conclusion that the union did not violate the Act by displaying two large banners and a 12-foot, Scabby the Rat near the entrance to a neutral employer. Concurring, Chairman McFerran stated that the Board must follow its prior precedent and that this outcome was required by the Board's decisions in *Eliason* and *Brandon Regional Medical Center*. Agreeing to an extent, Members Kaplan and Ring also concurred in the result. They reasoned that, under Supreme Court precedent, the Board was required to avoid interpreting the Act to find the union's conduct unlawful, as doing so would raise significant concerns under the First Amendment. Kaplan and Ring disagreed, however, with at least a portion of the Board's prior reasoning. Specifically, they objected to *Eliason* to the extent that it limited the inquiry under Section 8(b)(4)(ii) to whether the union's conduct has the same attributes as traditional picketing or, if not, whether it disrupts the neutral employer's operations.

The upshot? While Scabby the Rat may still be used to pressure a secondary employer, the Board will likely be asked to revisit the framework established in *Eliason* for analyzing Section 8(b)(4) claims in other contexts.