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ACCESS TO **UNEMPLOYMENT INSURANCE BENEFITS** FOR CONTINGENT FACULTY

A manual for applicants
and a strategy
to gain full rights
to benefits

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PART ONE

Introduction and General Context

DESPITE THE COMMON PERCEPTION that college professors enjoy the good life—pursuing their academic interests for weeks and even months on end, summers off, long breaks between semesters—more than fifty percent of those teaching on the college level are retained under tenuous conditions. Their employment is tied to student enrollment, budget allocations, institutional need, and other unpredictable events that may occur to either create a class or cancel it. They are, in other words, hired on a contingent basis: from year to year, semester to semester, or class to class. They do not have, to use the language of federal unemployment legislation, "reasonable assurance of re-employment." Thus, much of their so-called free time is spent looking for other temporary work or worrying about their next semester's income. During this open time they should be receiving unemployment insurance benefits.

This book is directed at all those who participate in the unemployment insurance benefits process — contingent academics who apply, unemployment personnel who take the claims, university and college administrators who approve or disapprove claims, and policy makers — all who have some power to improve

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these uncertain economic conditions, or one small piece of it, by ensuring unemployment insurance benefits to the substantial portion of the six to seven hundred thousand non-tenure track college teachers while they are between semesters. This booklet also aims to help unemployment insurance officials, higher education administrators, court and appeals process personnel, legislators and other elected officials understand the financial and emotional challenges the current system imposes on those charged with educating college students.

Goals of this booklet

To help mediate the unstable relationship academic contingents have with academic institutions, this booklet has two major goals:

- *First*, to assist and encourage individual contingent faculty members to file for unemployment insurance benefits and to counsel them about how to go about doing that with the greatest probability of getting those benefits
- *Second*, to suggest a strategy for faculty organizations and their allies at the local, state, and national levels to change the system so that contingent academic laborers can easily access unemployment benefits when they are between semesters.

The following advice is meant to be generic. This booklet is not meant to substitute for legal advice. It is meant for encouragement and for informational and strategic purposes. The details will vary from state to state.

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PART TWO

Unemployment Insurance History

IT'S A SURPRISE TO MOST PEOPLE to learn that unemployment insurance was instituted on a national level as a part of the Social Security Act of 1935, part of the New Deal social and labor reforms of the 1930s. Containing retirement pensions, disability insurance, survivor's benefits, and what later became Aid to Families with Dependent Children (AFDC, now TANF) the Social Security Act was undoubtedly one of the most important and certainly one of the most far-reaching of the 1930s New Deal reforms. And, like all of the other New Deal reforms, it did not emerge genii-like from Franklin Roosevelt (or even Eleanor) rubbing the magic lamp. Rather, it resulted from years of struggle in the streets and of organizing hundreds of thousands, even millions, of people who in a time of extreme privation desperately needed these benefits. The other main purpose of the unemployment benefits provision was to help restore prosperity. It was assumed that it would be a temporary, short-term benefit, not a substitute for a job, and hence benefits covered a limited number of weeks. This was not because many people were not unemployed for long periods when the law was passed, during the heart of the Great Depression, but because that was the length of time

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that was felt to be fiscally and politically possible.

Like most of the other workplace-related reforms of the New Deal, the Social Security Act excluded as many people as it included. Those ineligible for benefits were farm workers, domestic workers, and all public employees. Their exclusion had no other rationale than political expediency. A Senate and House disproportionately controlled by rural and Southern legislators was not about to restrict its own members' behavior with regard to their own employees, whether in their houses, on their farms and plantations, or as civil servants in the government that they led. The left-out workers were disproportionately lower paid women and minorities.

Some of these groups were later brought under the coverage of the Social Security Act's various provisions. Despite the benefits the Social Security Act brought, many groups, such as farm workers, remain excluded to this day. But public employees, including education employees and higher education employees in private institutions, were finally brought under the unemployment provisions of the Social Security Act in the 1970s. When that was done the use of temporary contingent non-permanent teachers was not a large social reality. And so, fearing that teachers with their "summers off" might take unfair advantage of this law—many of them received their pay in ten checks rather than twelve—a special provision was written in the federal enabling legislation. The law stated that while all states would have to provide coverage to this newly added group of workers, teachers would be excluded unless they could demonstrate that they did not have "reasonable assurance" of continued employment. This was, of course, primarily to avoid the double dipping of full-time regular teachers in the summer when they were still continuing to receive a regular "year-round" salary for a job that they were "reasonably assured" of returning to in the fall.

No other group was required to provide evidence of not having "reasonable assurance." Auto workers who were laid off regularly during the period of model change and regularly rehired were not required to present this evidence. Seasonal food processing, construction, and garment and fashion industry workers were not required to prove that they did not have reasonable assurance. Opposition existed to this extension of benefits to public employees because of the strongly held perception that many public employees were white-collar workers, even professionals like teachers, and really didn't deserve the same kind of support from the "welfare system" because they were in a different class position than

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blue-collar workers who worked in other seasonal industries. This perception persisted even though teachers' salaries trailed those of certain blue collar workers.

Like the rest of the federal unemployment insurance mandate, but unlike the Social Security retirement system, which was also established in the same 1935 legislation, this new provision did not set forth formulas for benefits or any other detailed criteria or procedures for implementing this mandate. That was all left up to the states. In other words, each state had to develop its own unemployment system, which now had to cover public and other higher education employees. Thus, teachers had to demonstrate that they did not have "reasonable assurance" of re-employment in order to collect. All the rest of the policies, benefit levels, formulas of calculation of benefits, procedures, and even the definition of "reasonable assurance" was left up to the each state government. Nor did the federal legislation mandate how these systems were to be funded. This meant that some states went to private insurers, requiring that employers buy private unemployment insurance coverage; some went to a state fund with a payroll tax; and some had multiple funds designated for different sectors of public employees. One state, New Jersey, even requires employees to share in the cost.

Thus, huge variations exist from state to state. In general, however, the perception that teachers could not apply for unemployment or those between school terms could not be considered unemployed remained. This was a reasonable approximation of reality for almost all teachers at all levels from the early 20th century until the 1970s. That reality, for higher education faculty, began to fade in the 1970s as increasing numbers of non-tenure track faculty were hired. By the 1990s, the trend of hiring contingent academic laborers rendered those original assumptions invalid, for a vast majority of college teachers had become contingent employees.

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PART THREE

The Casualization of Higher Education Faculty

ACADEMIC TENURE IN THE UNITED STATES only became widespread in the 1940s and 1950s, after World War II. At that time, there was a shortage of qualified persons to fill higher education faculty positions in the face of a massive expansion following the G.I. Bill and explosive growth of community colleges. In this context of increased faculty clout in the marketplace the American Association of University Professors, along with similar initiatives promoted by the National Education Association and American Federation of Teachers, was able to introduce and spread tenure systems and academic freedom policies in higher education. Then, as now, tenure instituted a system of due process rights before dismissal for cause and a presumption of continued employment but did not protect against economic layoffs or program closures.

But beginning in the 1970s and accelerating until now, higher education administrators have hired more and more teachers off the tenure track, both to save money during budget crunches, to manage enrollment fluctuations for the

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growing number of non-traditional and part-time students, and to enhance their own managerial control. Today, only a third of those who teach college classes are tenured or have the prospects for tenure.

Tenure is the only true job security that exists in the faculty realms in most U.S. institutions of higher education, except for those who have union contracts with tenure or just-cause provisions. Although many local unions representing contingent faculty – contingent-only and combined units – use various strategies at the bargaining table to gain job security for contingent faculty, including multiple year contracts, seniority systems, and processes by which part-time faculty positions convert to full-time tenured positions, most of these do not rise to the level of meeting the "reasonable assurance" standard, the particulars of which will be discussed later in this booklet.

The point is that the majority of faculty in credit, degree-granting higher education institutions and nearly all other post-secondary and adult education teachers are hired on an explicitly term-to-term often class-by-class, or year-by-year, on an "at-will" and temporary basis. This employment may continue for years on end, but no matter how many times they are re-employed, these employees are without "reasonable assurance" in the sense that there is no assurance that their employment will continue for the following term or year if enrollment drops, finances change, or classes are needed to fill out a tenured person's load.

Those who drafted the unemployment insurance legislation never contemplated current conditions in higher education, nor did they contemplate that working conditions for the majority of higher education instructors would resemble the conditions faced by factory and service workers more than they would resemble the working conditions of independent professionals, such as doctors and lawyers, to whom college educators were most often compared. Taken together, the casualization and de-professionalization of faculty work has created a group whose members want, need, and deserve the protection of the unemployment insurance system. So, how does this system work, and, in particular, how does it frustrate the legitimate needs and desires of contingent faculty?

PART FOUR

How the Unemployment System Works

IN DESCRIBING HOW THE SYSTEM WORKS OVERALL, this section relies heavily on *Don't Lose Your Unemployment Benefits,* (Apex Press 1995), by Jose I. Portela, a worker who had been laid off and who later worked for the unemployment insurance system in Texas for ten years.

As noted above, the federal law does not specify much about how states should set up and administer their unemployment insurance systems. It doesn't even specify how unemployment benefits ought to be calculated. It says little, save for the reasonable assurance requirement for teachers, about how to determine eligibility except that claimants need to be able and available for appropriate work. How these questions are resolved varies greatly from state to state.

Financing the system

All states finance their unemployment insurance program with a version of the payroll tax on employers, either paid into a state fund or by requiring employers to pay premiums to a private insurance company, which then covers their liability for unemployment insurance claims filed against them. Although there are

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disadvantages to the system, it has its advantages. An advantage is that the system is run by separate funding with a dedicated revenue stream to perform a particular task, like the Social Security Trust Fund or State Workers Compensation Funds. Another advantage is that the fund is partially protected, both fiscally and politically. It is fiscally protected from those eyeing it for other such purposes, such as revenue shortfalls. Politically, unemployment insurance benefits are more protected from elimination than other social programs because most people don't associate it with the same stigma that they attach to "welfare." Instead of distribution of funds from "the worthy" to "the not worthy," unemployment insurance is conceived like a bank account to which each employer contributes and each employee can withdraw from should they find themselves without work. That the rates imposed by states, either directly or through private insurers, on employers tend to be unprogressive represents a systematic disadvantage. This means that the rates are generally a percentage rate of payroll that often declines as payroll increases.

Another disadvantage of this financing system is that employers' actual rates are partially determined by their employees' past usage of the fund, just as car insurance rates are based in part on past claims experience. In cases in which a company has a high claims "experience," it incurs a higher rate. To avoid the higher rate, a company would lower its usage of unemployment benefit distribution as much as possible. Under such a scenario, potential claimants become "negative actuarial units" for employers. This means that employers have a positive incentive to prevent their employees from receiving benefits.

Higher education employers have two basic ways to lower their usage of the fund. One is to limit the number of employees who are laid off. The other option, an increasingly popular choice, is to continue to employ the majority of their teaching staff on a contingent no-reasonable-assurance basis but argue in unemployment insurance appeals hearings that the employee in fact does have reasonable assurance, and thereby often block receipt of benefits.

Eligibility

Most states have some combination of the following list of basic eligibility requirements:

- Unemployment through no fault of the employee
- Registration for and the active pursuit of work

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- Willingness to and availability for work
- Reporting any new (covered) full-time or part-time work and wages
- Reporting sickness or other physical work restrictions
- Reporting receipt of any pension benefits
- Filing unemployment claims properly and on time
- Reporting periodically to the local unemployment insurance agency
- Not receiving benefits from another state
- Reporting receipt of workers compensation benefits (due to a work-related accident or condition)
- Not misrepresenting or giving deceiving information.

Additionally, eligibility is determined by each state's varying monetary (economic) and non-monetary requirements.

Monetary Eligibility

Monetary eligibility for benefits is determined in each state by a complicated set of formulas and benchmarks, but, in effect, they all have to do with the applicant's having had a minimum amount of covered employment, as expressed in wages and time or both, that meets the state's base period, usually the first four of the last five calendar quarters prior to filing for benefits. "Covered employment" refers to work as a legal and recognized employee (W-2 Internal Revenue Service form) for an employer who is paying into the unemployment insurance system. That usually excludes those who:

- are self-employed;
- work as a 1099 contractor ("independent contractor")
- receive off-the-books payment for informal sector work,
- receive income from investments or rent,
- are in subsidized "sheltered" employment for the disabled
- do unpaid work, such as household labor, child and elder care, or unpaid internships
- had prison employment for money wages
- were placed in mandatory welfare or workfare positions
- participated in some other government work schemes such as Job Corps
- were regular full-time students while they were working

Some states exclude wages earned from nonprofit and religious organizations.

Covered employment can include wages earned from other states or the Dis-

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trict of Columbia, Canada, Puerto Rico, or US Virgin Islands via a combined (or interstate) wage claim. Which employers must pay into the system is not fully specified in the federal statutes, rather determination is left to the states.

Non-monetary Eligibility

Another criteria for determining eligibility for benefits, the reason for being unemployed, also varies by state. Although virtually all states will define as eligible workers those who have lost their jobs due to layoff, permanent or temporary, except for teachers, states vary tremendously on how they handle the issue of dismissal for misconduct, "voluntary quitting," dismissal without good cause, and employee relocation. This flows from the federal requirement that benefits be paid to those who are "willing and able to work" but doesn't define either of those terms. An important point for contingent faculty is that non-monetary eligibility (as opposed to economic eligibility) is determined solely on the basis of the last job – the most recent job. Therefore, if one had multiple jobs simultaneously or consecutively in the base period, they would all count in the economic calculation of wages for potential benefits, and economic eligibility, but only the final job – the job that one held on the last day of one's employment – would be the employment examined for eligibility vis-à-vis layoff, reasonable assurance, firing for cause, resignation, or other factors. Therefore, that also means that unemployment insurance personnel would investigate only this last job, usually with a telephone call to the employer.

Some states make it very difficult to collect benefits should the employer assert that an employee was fired for deliberate misconduct (stealing, fighting, assault, drug usage, things not subject to progressive discipline and other legal offenses occurring on the job). Because most employees do not have the benefit of union representation and because most workers are hired under an at-will basis, there is obviously a lot of room for disagreement. Added to that is the issue of constructive discharge. This is the legal concept that, when a job has become so onerous, unfair, unsafe, or requiring illegal employee action that in fact, the employee has not reasonable choice except to quit, then he or she has been, if not explicity, then constructively discharged. It is from distinctions like these that many unemployment appeals in the general workforce are made. It is infrequent, though, that these are the issues involved in questions of eligibility for higher education faculty. Most common for us is that employers contest claims.

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Eligibility can also be compromised under the "available and able to work" standard if the applicant is not actively engaged in a "job search." That means the applicant must be willing to look for a job comparable with the job they left. In some states, claimants must, during the period of benefit reception, seek employment at a continuously declining potential rate of pay and skill. This means that one cannot hold out for a job as good as the previous job lost a month ago. Job seekers may have to be ready to accept lower and lower pay the longer they are unemployed. What constitutes appropriate work that an applicant can be forced to accept is a matter of variation among the states. In general, that threshold has been lowered over the years.

Governance of the system

Generally, unemployment insurance systems are governed by a subdivision of the executive branch of each state's government, led by gubernatorial appointees and staffed by state civil servants, in a network of offices spread throughout the state. In recent years, more and more of the actual applicant and client contact, as well as the appeals processes, have come to take place in the mail, on the telephone or on the Internet, instead of face to face. Apart from any efficiencies that might be gained through this shift toward more indirect communication, such communications make the process more opaque and inexplicable to applicants and more likely that applicants will commit errors that will render them ineligible. Some states have discussed contracting out various of these functions as well.

Benefits

Benefits are figured, in every state, once eligibility is determined, according to a formula based on the total and quarterly covered income for the base period. For instance, if one filed in December 2006, hoping to collect unemployment benefits for the period between the fall and the spring terms, a period that may be between two to six weeks long, that applicant's base period in most states would begin by counting backwards twelve months starting at the end of September 2006, back to the beginning of October of the previous year, 2005. During that period, an applicant would be required to have earned a minimum income in covered employment for each of those quarters and a minimum income for the period in total. That would be the basis of the benefit calculation.

In addition to having a variety of formulas for different benefits, there are also

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different levels of maximums. In some states unemployment benefits almost rise to the level of a living wage. Others remain so low that a single person living modestly would find it impossible to survive. Furthermore, the federal government set twenty-six weeks as the maximum amount of coverage, on the notion that that unemployment insurance was meant to tide people over, not to provide long-term economic support because of inability to work or other factors. In recent times, extremely high localized unemployment rates, in some states, have prompted supplementary federal legislation to extend benefits for an extra ten to twelve weeks, on occasion.

In short, the system is complex, variable from state to state, under-funded, under-advertised, and understaffed. The Economic Policy Institute (EPI), a major (pro-labor) think tank, estimates that in 2003 only 40% of the unemployed actually collected benefits (EPI Issue Guide: Unemployment Insurance, revised 2004, viewed at www.epi.org/content/cfm/issueguides_unemployment_index on 3/5/08).

PART FIVE

Barriers Faced by Contingent Faculty in Gaining Benefits

THERE ARE FOUR KINDS OF BARRIERS that contingent faculty encounter in getting benefits. These are barriers that exist in our own minds, barriers in our organizations, barriers established by employers, and barriers inherent in the unemployment insurance system.

Barriers that exist in our own minds

Probably the biggest obstacle in the way of contingent faculty receiving unemployment insurance is that the vast majority never file, because of ignorance, fear, and an unwillingness to invest the time for a limited payoff. Almost without a doubt the largest single factor is that contingents are not aware that they are, and should be judged, eligible for unemployment benefits because they are truly unemployed, without income, and without reasonable assurance of re-employment virtually every time they walk out the door after having given their last final exam, and turned in end-of-term grades. Most still probably have never had the idea presented that they might be eligible for unemployment but see this

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time between semesters or over the summer without a teaching job as being just part of the price they pay for doing this work and being able to practice the profession for which they have trained. Unlike other employment situations in which large-scale layoffs occur, the unemployment insurance system has not historically developed outreach or educational programs for higher education. When K-12 teachers were laid off in large numbers during the cutbacks of the 1970s, unions routinely, often with cooperation from the employers, organized meetings with unemployment insurance representatives to instruct teachers how to claim their rightful benefits. Likewise, when manufacturing facilities have seasonal or permanent plant closure layoffs, an entire mini-industry of dislocated worker services springs into action to provide advice, services, and often access to job training. However, the routine ending of school semester, thus ending employment for contingent faculty, has not drawn the attention that mass layoffs generally attract.

Another challenge contingent faculty face is that they are often given misinformation. The prevailing notion presented is, "Unless you are permanently dismissed, you can't get unemployment as a teacher if it's likely that you're going to go back in the next semester." That popular perception, extremely widespread, causes most of our colleagues to assume that they are not eligible and cannot file. Another barrier to many is the feeling of embarrassment that, as professional workers, filing an unemployment insurance claim is somehow an admission that they "can't make a living" despite their years of formal education.

Nevertheless, the vast majority of faculty who are teaching without tenure, or expectation of tenure, do not have reasonable assurance of re-employment. We are not "under contract" despite the persistent use of that phrase to describe the assignment sheets that many of us eventually receive specifying our class assignments and pay. Except for those who have multi-year guaranteed contracts, the rest are hired on tentative class-by-class or annual assignments. Our assignments are contingent upon sufficient enrollment, adequate funding, and the administration's need to fill out the class schedule of its full-time staff when one of the full-time instructor's classes is cancelled because not enough students have enrolled.

Many things cause faculty to falsely believe that they do have reasonable assurance and that stymies their efforts to file claims during nonworking periods. The following events or factors may not necessarily constitute reasonable assurance of re-employment. The existence of one or more of these should not make

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one ineligible for benefits, although in some states they do:

1. **An oral suggestion** from a full-time faculty member, department head, or other supervisor that there will be an assignment the next semester;
2. **A written letter of assignment,** even specifying pay rate, if it includes any contingencies, such as "adequate enrollment," "program needs," or "economic factors" (Virtually all written assignments do contain these phrases.);
3. **Names posted in a class schedule** for the upcoming semester, on a sign in a department office, on a poster at a registration table or on a Web site;
4. **Having the continued use** of a mailbox, parking, library card;
5. **Continued access** to an individual or shared office, including storage access;
6. **A union contract, faculty handbook** or other explicit provision that provides for some sort of seniority factor in re-employment and assignment for contingent faculty;
7. **A union contract provision** or other regular procedure for paying a cancellation fee if a class is cancelled, unless the fee is the same amount as the salary for the entire class;
8. **Employment based on a soft money grant** that continues into the next year. (Although this may ensure a position, it does not necessarily guarantee who will fill it);
9. **An administrative, coordinating, or directorial responsibility** if not accompanied by a formal change from contingent employment status;
10. **Personal individual history of regular re-employment,** semester after semester.

None of these individually or collectively should constitute reasonable assurance of re-employment and should not prevent contingent faculty from filing and successfully claiming unemployment benefits. However, in some states case law in fact has used these props as a means of denying benefits and in other states employers who challenge an unemployment benefits claim will likely invoke these as examples of reasonable assurance of re-employment during an appeals hearing and will often win.

Reasonable assurance of re-employment would be a commitment by the employer to pay contingent faculty at a continuing and predicted rate, and it should not be dependent on how many students show up or of the the exigencies of the other faculty members. That's what "regular status" on the tenure track gives, and until contingent faculty have that or its functional equivalent, they

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arguably do not have reasonable assurance, but some courts disagree.

Another barrier for many comes from fear that filing for unemployment insurance may spark an investigation into the circumstances surrounding their departure from their last job. Many consider the drawing of attention of barely-known administrators to themselves as jeopardizing future employment prospects, and justifiably so. Some contingents may be reticent to file claims due to institutional program-based budgeting. Under this scenario, many institutional subdivisions, such as departments, and programs, function as independent businesses that are expected to break even or make a profit on their own. Thus, even the lowest-level administrators and department heads may feel the pressure to minimize costs and maximize revenue. An unemployment benefits claim could therefore result in permanent non-rehire as retribution for straining the budget. However, the more people who file claims, the more difficult it may be to retaliate. In some states, claimants are specifically protected from employer retaliation for filing for unemployment compensation benefits; in other states they are not. Before filing a claim, it may be advisable to seek legal advice regarding whether they reside in one of the states in which retaliation is prohibited. Contingent faculty members who belong to unions may seek such advice from their union or seek union legal representation after the fact to challenge the denial of unemployment compensation or to challenge an employer retaliation for filing such claims.

The amount of time and effort of filing for unemployment benefits creates yet another barrier to pursuing compensation. Many may think that the low success rate and the little compensation is not worth the effort. Although these attitudes are completely understandable and may even make sense for some who have other adequate sources of income that are not covered by unemployment insurance, successfully filing a claim is worth it. One can never even predict whether an appeal denied one semester will be approved the next. Likewise, one can never be sure that one's low base period salary and therefore low potential benefit for one filing might not increase substantially in the next year with more employment making the benefit more worthwhile.

Barriers in our own organizations

In our own unions, minority constituencies, such as contingent academics, face barriers in persuading the majority to embrace initiatives that would not directly

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benefit them. For that reason, developing a grassroots strategy to win support and to build solidarity is important. Part of that includes a willingness to engage in the work of their union, e.g., to participate on a local, regional, state, and national level as delegates to conventions or to run for state and national posts. Besides having the opportunity to learn the union's organizational structure and protocol, participation allows contingent academics the opportunity to know and develop relationships with union leaders across the state and across the nation. These opportunities help develop coalitions within the organization that can eventually launch these initiatives. This process for action takes effort and commitment for the eventual payoff.

Barriers created by employers

Naturally, employers seek to minimize their fiduciary exposure by challenging legitimate claims, whether in the initial telephone call that they receive from the unemployment insurance agency or during the appeals hearing. This barrier is not universal, but in situations in which several contingents begin to file for benefits, perhaps because of new unionization or other educational efforts, employers often tighten down administratively on who can speak for the employer to unemployment insurance investigators and then instruct those people very closely to simply assert that for some combination of the factors listed above, this contingent faculty person has reasonable assurance of re-employment between terms. To aid in the effort to keep claims down, a cadre of private consultants has formed to assist higher education administrators make their successful unemployment claims go away.

Higher education administrators have an additional advantage in fighting claims because of the business relationships their human resources representatives routinely form with state officials. These relationships add to their credibility as do their relative positions of power within their respective institutions. Both of these realities undermine an individual contingent faculty member applicant who, unfamiliar with the process and the language, faces, often alone, well-versed and well-connected administrators.

Perhaps as important a barrier as employers' misreporting of reasonable assurance is the fear they foster in contingent employees that any claim, even if successful, will result in non-reemployment. This is a barrier not only in the minds of contingents but also a real threat in every employment situation where power is so unequal. All contingents know of colleagues who have been dismissed for

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less. Every claimant has to make the decision themselves, but retaliation is much less likely if filing is part of a collective campaign by a union or other organized group. If retaliation is a serious worry, consider organizing a group to file at the same time and then keep in contact through the process.

Barriers stemming from the unemployment system itself

The ambiguity inherent in the term *reasonable assurance* represents a difficult obstacle to successfully winning an unemployment benefits claim. The term has not been clearly or publicly defined in a definitive way in most jurisdictions. Even court decisions, in many states, only allude to it but attempt no full definition. This ambiguity allows for employers to take advantage of that uncertainty when presenting arguments that have little bearing on the realities of a contingent faculty member's situation by pointing to irrelevant evidence, such as having a library card or receiving a letter of contingent assignment, as evidence of reasonable assurance. These strategies create confusion and infuse ambiguity in the practices of the unemployment system itself—from the initial worker who interviews the claimant, all the way up to the hearing officer who hears the appeal and those who supervise them.

This complexity entices those reviewing such nonstandard situations to opt for the easiest solution: to routinely deny these claims, especially in times of budget cutting and pressure to reduce public assistance rolls. The majority of contingent academics who fail to get unemployment insurance probably lose it at the point of the telephone call from the unemployment insurance office to the most recent employer asking "Is this person working for you? When did he leave? And does she have reasonable assurance of re-employment?" – or, most commonly, "Will he be coming back next semester?" These questions may not be the most appropriate questions to pose in these nonstandard employment arrangements. While the employer may answer truthfully, the reality of employment is not fully accounted for. A more appropriate question may be "What are the conditions that would reasonably assure re-employment?" The answer to that question could require the administration to answer that re-employment depends on enrollment, funding, and permanent faculty needs for full-time loads. Based on the answer, the administrator could be required to produce evidence documenting enrollment trends from semester to semester. But as it stands now, employers will often simply assert reasonable assurance and most of the time unemployment insurance investigators will accept their assertion. At that point,

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many denied claimants simply walk away, deciding that they aren't up to filing an appeal and feel that they need to spend their time directly seeking additional employment rather than pursue an appeal that might result in some money sometime in the future.

To better direct the interview, contingent faculty claimants need to be able to redirect the questions so that the reality of employment is reckoned correctly. The questions, as currently asked, were written for those who had full-time jobs that were long-term. This was the situation for which the system was created to accommodate. But it is not the situation in which millions of workers in the 21st century find themselves. Therefore, our claimants often give honest answers to the questions, but because the questions are inappropriate, contingent faculty members often talk their way out of receiving benefits. For instance: many interviewers will not ask, "Do you have reasonable assurance?" They will ask, "Do you have a job for next year, for next fall?" Unless properly coached, claimants may answer, "Yes, I have been told I have a job in the fall." The interviewer will then ask, "Do you have it in writing?" The claimant will answer, "Yes, I have a letter." That is the end of the interview, and the claimant is denied. The concept of reasonable assurance has never been addressed. And even if it were, unless claimants understand that they do not have reasonable assurance of re-employment, they are likely to say something to the effect that, "Yes, I expect to go back." The correct answer is, "No, not with reasonable assurance."

Another barrier that the unemployment insurance system itself often reinforces stems from the generalized prejudice against people who are perceived as professionals claiming worker benefits. The idea of someone with a masters' or a doctoral degree, and who may even adopt a rather haughty attitude, sitting across from an often-less-formally-educated interviewer may not create an interaction favorable to the claimant receiving benefits.

Finally, there is also a widespread view on the part of the public that people doing the same work will have the same pay, conditions, and job security. This myth is that "equal pay for equal work" is a law that applies to workplaces generally. There is no such general law in the United States or any state, unfortunately. Consequently, even though a contingent faculty member teaches the same students as a full-time tenured professor, teaches the same classes in the same building, and has the same qualifications, many people, including unemployment officers, will find it hard to believe that the contingent faculty member does not earn the same salary or have the same secure employment conditions.

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PART SIX

How to Claim Benefits

WHEN SEEKING BENEFITS, claimants first need to believe that they deserve them and understand that they are truly unemployed. Those who don't believe this don't usually present a convincing case. The first demonstration of this self-confidence is applying for unemployment benefits on the same day or the next business day after giving the final exam, even before handing in grades. Although determining what actually constitutes a contingent faculty member's "last day of work" is debatable, the most common determination for what constitutes the last day of work is the last day one actually performed services for pay. Presumably, one is available for new work on the next business day.

Two general tips apply to the entire application process. First, do not lie. Committing fraud, if discovered, can result in having to pay back benefits, pay penalties, and face criminal charges that include fines and imprisonment in some states. Second, claimants should be as brief as possible. Let the interviewer ask for more information instead of volunteering information that at best is irrelevant and at worst is damaging. Many contingent faculty applicants have talked themselves out of benefits by trying to "explain" their situation, either in writing or

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orally during the interview.

The advice that follows is meant to be generic. Although the principles are generally applicable, the details will vary from state to state. There is no substitute for talking with an informed union representative, colleague, or other advocate who has been through the process in your locality.

Most states have a waiting period, so filing as soon as possible expedites the process. Generally, a first-time claimant usually must complete the application in person at the unemployment insurance office. Claimants may apply at any office in one's state and are not required to apply at the office closest to one's home or workplace. In some states, an actual appointment is necessary; in others, particular days are set aside for particular portions of the alphabet. Call or check the unemployment agency Web site to find out. In some states, even the initial appointment is now over the phone or via the Web site.

Going to the office

It is best to go early in the morning to be sure to complete the paperwork before the office closes. Claimants should wear the clothes they would normally wear when teaching. Bringing a book or something to read helps during what may be a long wait. Because of the numbers of other claimants with varied backgrounds and appearances, the staff is likely to be harried and perhaps not even in evidence. Claimants should look for signs, stacks of forms, and papers; take a number if necessary; and generally behave in a calm, respectful manner. Even if "service" is slow, taking it out on the unemployment insurance office staff will not help. Often staff members are overworked because of cutbacks in the public sector, leaving them with barely manageable caseloads. In any case, expect staff members to be under considerable stress. Viewing agency staff members as fellow workers or union brothers or sisters can help curtail the frustration levels inherent in this process. Claimants should also understand that they do not have priority rights over anyone else who is waiting in line. To reduce some of the waiting time, some states have set up Web sites for initial applications.

Most of the following still applies to the online process, although the chance for misunderstandings increases when not dealing with someone face to face. Thus, when the option is available, in-person interviews are optimal.

The following lists the data and materials claimants need to take with them and provides tips for preparing for the application interview:

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1. A list of the institution names, addresses, and telephone numbers of each employer. When selecting the contact number of someone from the institution of last employment (dean, immediate supervisor, human resources representative), claimants should pick the person most likely to acknowledge that employment for the next semester is not assured. Although making such a determination is difficult, one should pick someone with whom one feels comfortable calling about filing an unemployment insurance claim and discussing that the realities of contingent employment do not provide reasonable assurance for employment. Often, of course, it is just guesswork. It is unusual for any college offices to have any training in this, barring an effort by the central administration to contest all unemployment claims for financial reasons or barring a concerted educational and other effort by the local or state union to get benefits for contingent faculty.

2. The dates of employment at each college and at any other covered employment. Include employer names and dates of employment for the entire base period. To cover the base period, go back 15 months, to be safe. Base periods are figured differently across states. Covered employment includes all positions from which a W-2 form is filed. Claimants should list the first day of employment as the first day of class (or the first day of going to campus to do other specific compensated work). Do not merely list the first and last day of the semester from the college schedule. To do so may result in some lost benefits. Report the academic employment for this entire period, but *report it in pieces*, by semesters or by year (for those who are hired for a whole academic year), not as continuous employment. Do not report having worked for the employer for eight continuous years, giving the impression that that employment has been continuous without periods of unemployment. Making this mistake will often cause the interviewer or investigator to say, "If you have been working continuously all this time, why are you applying for unemployment now, for the first time?" In fact, of course, work has not been continuous. Contingent academics should explain that they have had periods of unemployment between every semester but only recently have discovered that unemployment benefits are available to them. Claimants should remember to include non-academic employment for whatever base period is specified for that state. Exclude non-covered employment. Assume that any income for which one has received a 1099 or income made in the form of dividends, rent, royalties, or cash with no paperwork

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is not considered covered employment. Referral to tax returns or a tax advisor should clarify this. The risk of making a mistake in this matter is, first, that you artificially lower your benefit amount by not reporting all your covered income or, second, that you risk accusations of fraud by incorrectly reporting income.

3. Your letter(s) of appointment for the next term (should that be the means of notification of employment) which give the contingencies of the assignment. Claimants should also bring any documents that indicate that they will not receive any work. Your union contract may also list the contingencies of your employment.

4. Report of rate of pay, a request made by most states. Rate of pay should be reported as "per semester or per course assignment" because that is the unit for which contingent faculty are hired without assurance of continued employment. Such a question during the interview provides the opportunity to say, "I am hired semester to semester and only on a term basis," which supports the non-reasonable assurance for re-employment assertion. For those who do not have a letter of appointment that indicates the pay rate, a paycheck stub will suffice. Another source for documented pay rate may be published as part of a union contract pay schedule or in a faculty handbook. To answer the question of how many hours worked per week, as required by some states, claimants should convert the percentage of their work to that of a full-time load at a particular institution and then express it as a fraction by writing on the form, "half time," or "quarter time," etc. For instance: if a contingent faculty member teaches two classes at an institution that considers a normal full-time load as five classes a semester, the claimant should put down "part-time, forty percent." Putting down hours for part-time academic work confuses the matter because many contingent faculty are often technically paid only for time in class, even though much of the work – grading papers, holding office hours, preparing classes and assignments, pursuing professional development, creating Web pages – includes many more hours outside class. Attempting to explain this to a state unemployment insurance worker is unnecessarily confusing.

5. Identification cards and other legal work documents. Bring a driver's license, state ID card, passport, social security number, alien card ("green card") if not a citizen, mailing address, and telephone number. Do not use a work address or work telephone number.

6. Pen, pencil, and a pad on which to take notes.

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Filling out the forms

Upon arrival, claimants receive one or more application forms to fill out and a job-search form for the employment services, which in many states is run by the same agency that runs the unemployment insurance office. Claimants may also be given a separate form for those whose base-period jobs were based in another state, which will require separate bureaucratic processing on the agency's part and therefore usually require a separate form and additional information. Claimants may then complete the unemployment insurance forms completely.

Claimants should read any provided information sheet before filling out the claim form. Not to do so is a gross error. Although these forms and information sheets may be written inappropriately for contingent academics, the forms should be read carefully so that the most truthful approximation possible is conveyed on the forms and during the interview. Do not, however, over-read the form.

Many states ask claimants if they are in a union, and if so, have they registered with the union for work. Claimants should not be alarmed by this question, for they are not obliged to reveal union affiliation to the unemployment insurance agency unless they actually found a job through the union for any of their other employment. In academic work, of course, contingent faculty members do not go through a union for work. This question is meant to apply only to those situations in which people secure jobs through a union hiring hall or referral system, such as in the building trades, artistic or creative guilds, and some food service or culinary unions. Unemployment benefits personnel are not actually asking whether a claimant is personally a member of a union, despite the phrasing of the question. The proper answer to the question, "Have you registered with the union?" is "NA," not applicable. This is not fraud because the question is poorly written and is, in fact, inappropriate, so to answer that it is not applicable is the most appropriate and truthful response to the question. It is similar to job applicants who respond to the question, "Have you ever been arrested or convicted of a crime?" by saying "No," because their record has been legally sealed or expunged, and therefore have the right to respond in this fashion. Many other questions on the unemployment forms will be similarly inappropriate to the employment realities of contingent faculty. Claimants should interpret each question as best as they can, answer briefly, and write "NA" if a question seems completely inappropriate. They should let the interviewer ask for more information.

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When listing employers and dates of employment on the form, claimants should include those for only the defined base period. If the base period is not defined, claimants should provide information that dates back at least fifteen months and then inquire as to how far back to go and what the defined base period is during the interview.

Most benefits claim forms include a box for "Reason for leaving the job." There may be choices listed, or it may be a blank to fill in. Some of the choices are: quit, fired, dismissed, and laid off, temporary or permanent. Choose the laid-off option or write "end of my assignment" or the closest approximation of that. The purpose here is to show that claimants were not fired, terminated, or dismissed for cause (meaning for an infraction or something that was claimant's fault or because of misconduct) but rather that there was no work left for the claimant at that time. There may be a question that asks, "Do you expect to return to work?" If so, answer, "I do not have reasonable assurance of re-employment." If it's just a box to check, check, "No." How one answers why one left this employment is especially important for the claimant's last employer because that will be the employer the unemployment insurance investigator will call and this will be a key issue in determining eligibility.

The end of the form provides space for the claimant's signature. Claimants should sign and print their names exactly as they sign it for their employment. Those who have worked under different names for different employers or at different times in the base period should give all the different names they have worked under. Examples of different names are "Ellen W. King," "Ellen Woodrow King," "Ellen Woodrow," "E. W. King," etc.

The interview

At some point, after filling out the forms, claimants will be called up for an interview. The interviewer's main purpose is to review the application and ask clarifying questions. The most important question likely to be asked is, "Do you have a job to go back to?" or words to that effect. The answer should be, "No," if you have nothing at all, or "Not with reasonable assurance." Those with a tentative commitment for an assignment, could say, "Only an assignment contingent upon enrollment, but not with reasonable assurance." Those who don't even have a tentative assignment, just say, "No, not with reasonable assurance." If a claimant is questioned further, a point of clarification might be, "I am a temporary teacher,

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unlike professors with tenure or who are on the tenure track, who have assurance of continued employment." If the interviewer asks for the letter of assignment, claimants should provide it, pointing out the contingencies of the assignment.

Claimants who are claiming benefits for the summer should not mention whether the institution holds an intercession or summer term. According to the calendar, this term would be the next theoretically possible teaching opportunity. But in many colleges, very few part-time contingents receive assignments during these terms. In theory, in some states, benefits can be denied to contingents for not requesting work in these terms. So do not bring it up, but if asked, tell the truth.

Claimants may be asked to explain their unusual employment history—multiple jobs at one time, several start and stop dates, and even the content--as expressed on the application form. Remember that the contingent academic laborer's work life appears very unusual to outsiders. Keep to the rules of answering truthfully but as briefly as possible. Resist the temptation to explain the whole situation and "teach" the interviewer about higher education faculty employment in the twenty-first century. The goal here is to get unemployment insurance, not to exploit a "teachable moment."

At the end of the interview, the unemployment benefits interviewer may say that the benefits are approved pending a discussion with the claimant's employer. If the interviewer does not volunteer this information, asking about it is appropriate, saying something like, "Can I expect to receive benefits, and when will they start?" Generally, claimants will also be given job-search materials and requirements that the claimant must fulfill in order to remain eligible for benefits. These include various tasks that demonstrate that claimants are earnestly looking for work, such as filling out forms, registering with employment Web sites, or taking a class on developing a job-search strategy. These requirements are essential and they are not onerous.

After the interview

JOB SEARCH

For contingent academic laborers, a job search can often require as little as calling colleges and asking if they are hiring in their respective fields. Generally, contingent academics do not have to turn in evidence of a job search unless requested. This is partly a consequence of the cutbacks in staffing in state agen-

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cies. One cannot be required to look for work outside of one's field or substantially below one's previous pay rate, at least at the beginning of one's unemployment claim. Do not volunteer to do so. For contingent academics, this means that they cannot be required to look for K-12 teaching work, such as subbing. The magic words in most state unemployment statutes are "equivalent and appropriate work." However, claimants should be sure to retain all materials they receive and take notes of any oral exchanges. They should also take notes on any nonroutine interviews, discussions, or telephone conversations with unemployment insurance staff. To retain their eligibility, claimants may have to maintain contact by either by telephone or by computer. Periodic office visits are becoming less common but still may be required in some states. In any case, claimants should keep records of their job search as required.

IF ALL IS NOT WELL

Those who start receiving unemployment checks after the usual week's waiting period should enjoy their good fortune. But those whose benefits are held up should take the next step and appeal the decision because in some unemployment insurance offices and with some employers, denials are unfortunately routine. The first step to an appeal is to read the instructions provided by the unemployment agency. Most states merely require a brief statement indicating a desire to appeal and the basis for appealing. The basis of appeal must be a challenge to the basis of denial, which is expressed in the notice of denial. Typically benefits denial hinges on reasonable assurance. In essence, the denial contends that contingent academics have reasonable assurance of re-employment by citing a section of the state law that includes the reasonable-assurance clause. In rebutting the denial, most states require only a statement of appeal and provide one line on which to state the basis of appeal. Because the reason for denial is firm and cannot later be expanded to include other reasons, claimants should not answer beyond the scope of the denial. When in doubt about how to respond, claimants should seek advice, if possible, from their union or from a colleague who has gone through the process.

Sometimes the denial comes after claimants have already begun to receive their checks. Claimants who have already received benefits checks should not panic if they included truthful responses in their applications and need not fear penalties. The worst that can happen is that they must pay back those benefits.

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Those who appeal are not subject to increased penalties or prejudice in any way.

In some states, appeals hearings are now held on the telephone. In others they are face to face with the hearing officer, usually referred to as an administrative law judge. This process is free to the claimant. Claimants generally have the right to an advocate: an attorney, union rep, experienced friend. They may also elect to represent themselves. Because the procedures of hearings vary from state to state, the specific details of how the process works cannot be detailed herein. Therefore, claimants should be sure to read carefully the appeals materials provided either at the end of the initial interview or by mail. Some states ask that documents be submitted before the hearing, which may result in a changed determination obviating a subsequent hearing. Other states do not require documents before the hearing. Usually, claimants will have the opportunity to examine their file before the hearing, often at the unemployment office. Claimants should take advantage of that opportunity, even if it is set in the hour before the hearing. This will allow claimants to see what the hearing officer will see. Among those attending the hearing, besides the administrative law judge and the claimant, will likely be a representative of the employer, especially if, as is common with contingent academics, the source of the denial is based the employer's assertion that the claimant has reasonable assurance of re-employment the next term.

As in all other official interviews, investigations, and legal proceedings, claimants should try to remain calm, speak truthfully, ask for help or for a question to be repeated when they are either uncertain about a question's meaning or need more time to think about it. They should remember to answer only what is asked. A claimant's main evidence may be the assignment letter, with the contingencies of employment listed (for example, "contingent upon enrollment, funding, or program needs"). Although claimants may represent themselves, an experienced advocate can be helpful in preparing for the hearing and advocating at the hearing itself. If a claimant has the opportunity to question the employer representative, an important question might be, "What are the contingencies of my assignment(s)? Does this letter reflect that?" However, in asking a challenging question, claimants should avoid being drawn into an argument with the employer representative. In some cases, the employer doesn't even send a representative.

The hearing itself may vary from twenty minutes to over an hour. Most hearing officers are either attorneys or specifically trained in this section of the law.

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The hearing may be conducted very informally or very formally, depending on the agency. The hearing officer may be an employee of the agency or hired as an independent contractor. Hearing officers can vary tremendously from officious and unfriendly to friendly and helpful. Remember that the hearing officers are hired by the agency and so may be subject to the same political pressures that exist on the agency to save money, cut rolls, and not offend major employers and political powers. Most administrative law judges want to conduct fair and competent hearings, but they may prefer not to attract undue attention to themselves by issuing decisions far beyond precedent. Most of them will not be personally familiar with the employment situation of contingent academics, and some will not want to learn about it. When faced with an administrative judge that fits these characteristics, the fall-back strategy is to play it by ear and do the best one can.

This entire process may take weeks, or even months, and determining whether the end result is worth the emotional energy and time invested is an individual decision. Obviously, it is much easier when contingent academic laborers are supported by a union or participate in other supportive organizations. For example, through its Unified Legal Services program (a partnership between the NEA and its state affiliates), NEA members are eligible to apply for legal assistance in defense of their job rights, including help in connection with claims for unemployment compensation. This legal assistance is generally at no additional cost to the member.

Some people have retained attorneys, but there are two frequent problems with that course of action at this stage. One is that attorneys are expensive. Their fees would most likely exceed the unemployment insurance benefits received. Secondly, the vast majority of attorneys are unfamiliar with the unemployment law, regulations, and case law, unless they are specialists. Even unemployment specialists know very little about the employment situation of contingent academic labor or about the precedents and case law that may or may not apply to contingent labor. Generally speaking, an experienced faculty union advocate is a much better choice than an attorney. Contingent academic laborers who work on campuses without union representation could seek help from a union that represents both full-time tenured and contingent faculty or from other organizations, such as the Coalition of Contingent Academic Labor (COCAL), that work with contingent faculty.

PART SEVEN

Advances and the Rise of Efforts to Claim Unemployment Benefits

WITH THE RISE OF A NATIONAL MOVEMENT to organize contingent faculty in the last 30 years and especially in the last ten years, more and more faculty have been attempting to claim unemployment insurance and have been using their organizations to assist them in gaining benefits and in achieving reforms in the system. Still, the reality varies by state, with substantial struggles emerging in those states where unionization is concentrated – New York, Massachusetts, California, and Washington. These attempts have included direct efforts to change the administrative procedures and directives within unemployment insurance agencies, group appeals through the unemployment insurance systems and into the court systems, and legislative efforts to clarify reasonable assurance or sanction employers for asserting reasonable assurance where there is none.

Some of the struggles that have been waged have not always been the most useful. In Illinois, for instance, one contingent faculty member carried an appeals case to court on his own behalf, without counsel, and unfortunately created a bad precedent by the weaknesses of his case as presented (*Finley C. Campbell v. Department of Employment Security and Colombia College*,

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Appellate Court of Illinois, March 28, 1991). The court determined that Campbell had reasonable assurance. His case was compromised by administrative and procedural errors that he made, probably because of lack of counsel.

By far the most successful efforts have been in California, where in 1989 the State Appellate Court decided in *Cervisi v. the California Unemployment Insurance Appeals Board* that Gisselle Cervisi and all of her co-claimants in the group case were in fact without reasonable assurance and therefore eligible for unemployment insurance between a fall and spring semester. This case had been carried by American Federation of Teachers (AFT) Local 2121 at the City College of San Francisco and the California Federation of Teachers with Robert Bezemek as the lead attorney and union leader Rodger Scott functioning as the chief researcher and paralegal. This test case was pursued all through the appeals processes within the unemployment insurance system in California, then to the court system, and ending at the State Court of Appeals. The particular significance of this decision was that the court considered all of the factors that had been cited in many previous appeals for reasonable assurance. It was probably the most comprehensive judicial examination of the whole situation that has occurred nationally to date because it was presented by skilled advocates, it was based on excellent research with adequate resources, and it was a group case. Virtually all of the problem factors in the list in Section Five were present in at least some of the claimants. Because of this decision, which included many contingent activists and leaders within it, the union was able to pursue a combined pressure and educational campaign to effectively apply this decision to contingent higher education faculty throughout California.

This two-pronged approach included first waging an educational campaign to alert all union and individual contingent faculty of the decision of their right to file and of the means by which they could defend their benefits claims by citing the Cervisi decision instead of relying on their own personal employment history. To aid contingents, the union printed thousands of copies of a fact sheet that stated that the claimant was a part-time temporary community college teacher and therefore, as a member of that group, did not have reasonable assurance of employment as determined by the Cervisi decision. Claimants were urged to present their fact sheet when applying for benefits. This educational campaign eventually spread to unions and contingent faculty in the State University system, the University of California system, and the hundreds of adult education

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programs, many of which are attached to K-12 or community college districts.

The second action prong following the Cervisi decision included a campaign to pressure the unemployment insurance system to educate its own staff so that it would fairly implement the decision. This effort continued for many months and years with generally successful results. A directive was finally issued from the state agency headquarters to regional field offices specifically drawing their attention to the decision and to the fact that, therefore, contingent community college teachers were as a group without reasonable assurance and it was therefore not necessary to perform individual investigations beyond determining that they fell into this category. Even with this memorandum and with its circulation throughout the state and its reproduction by the union to give to claimants, problems still persisted in some of the more conservative areas of the state. Some field offices persisted in calling individual college administrations and some college administrators persisted in asserting that reasonable assurance existed. Although the vast majority of these cases that cited Cervisi won on appeal, those whose claims were denied created a chilling effect on potential applicants working in those systems. In an attempt to correct this problem recently, organized contingents, with the support of all of the faculty unions, including the NEA, AFT and AAUP affiliates, pursued a legislative provision mandating that employers respect Cervisi in their communications to the unemployment insurance agency. This legislative provision passed and is now law.

This California struggle extending over twenty years is certainly the pinnacle for contingent faculty in this area. One reason this case took place in California and was successful there, is because California is one of the few places where the vast majority of contingent faculty are organized into unions and also into joint units with full-time tenure track faculty. Furthermore, contingents have gained substantial influence in these unions, which allows them to exert economic and political influence through the resources of the entire faculty.

Even before Cervisi, some locals in California had been successful in bargaining agreements with their administration that a particular administrator would receive all calls from the unemployment insurance agency and would not challenge an unemployment claim because reasonable assurance in fact did not exist.

Remember also that administrative law judges' decisions may also be appealed, in many states, to a state appeals board still within the agency, and after that, to court. The Cervisi case, for example, ended up at the state appeals court.

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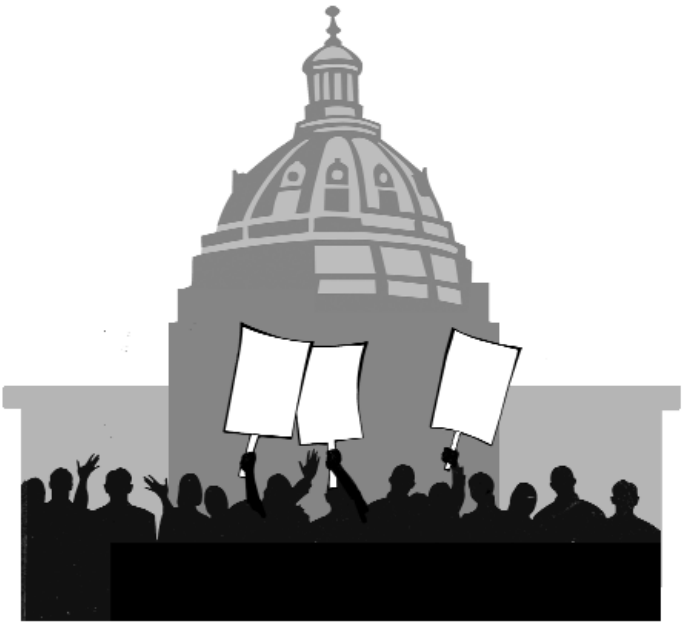

PART EIGHT

A Strategy for Change

NATURALLY, THERE IS A LIMIT to the justice an individual can obtain alone, no matter how intelligent and well advised. Collective action is the only way to truly fix this problem, and collective action requires a strategy for change. Obviously the best thing would be to cause employers to eliminate contingency as a basis for employment, achieved through general advocacy for equity and justice for contingent faculty. The more contingents can make themselves expensive and less flexible to the employer, the less incentive employers will have to create contingent positions and the more incentive to create stable or tenure-track positions. In that sense, increasing the number of individuals who apply for unemployment is itself part of a strategy for change because it puts pressure on employers economically and administratively. It can also be a source of embarrassment as more and more people realize that so many higher education faculty members are actually casualized employees who are regularly unemployed.

There are also many other initiatives that we should be doing together and

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urging our organizations to do with and for us.

National action

At the national level, unions and professional associations should be raising the issue of the unfairness and inappropriateness of the "no reasonable assurance" criterion as it applies to contingent college faculty. That one-sentence repeal in the federal law might solve most of these problems, although that would require policing its implementation state by state. But that would be a much easier job than waging the campaign to demonstrate reasonable assurance on a case-by-case or state-by-state basis. This is the sort of fight that could help build organization among contingent faculty and strengthen existing unions and professional associations. This fight, within these organizations, would also educate department chairs and other lower-level administrators, who are often members or even leaders of these organizations themselves, about the realities of the employment situation and why they should support contingent academic labor rather than support the short-term economic interests of their institutions and managements. This national campaign could include model legislation, lobbying, and other educational efforts. It could set a tone that would encourage local, regional, and state union and association bodies to take action and involve their contingent faculty members.

National unions could sponsor a state-by-state survey of the interpretations of reasonable assurance and of the financing schemes and benefit calculations formulas as they impact contingent faculty of all fifty states. Alternatively, the national unions could pressure the federal Departments of Education and Labor to undertake such a study.

State action

At the state levels, where implementing legislation and regulations are created and where unemployment benefits are administered, state faculty organizations need to develop efforts on all fronts and preferably coordinate them between the states. The importance of coordination and information sharing was demonstrated to this writer (Joe Berry) recently in a conversation with the head of the Appeals Section of the Illinois Department of Employment Security. After listening to a rather lengthy explanation of why the current situation of routine denials was unjust, the main response from the official was, "Well, what state does it right?" Luckily, I was able to answer, "California, mostly." Even though not

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precedent setting, actions in other states, especially large ones, are heavily influential, and such situations and such victories need to be shared.

Specifically, we can learn from past experience that the issue should be attacked on multiple fronts. The unemployment insurance agency can be approached through its administrative hierarchy to recognize the injustice that is being perpetuated. Through education, administrators can be persuaded to change the agency's practices systematically. In most cases, high-ranking administrators have the power to do this. If the political regime in the state capitol that appoints the directors of these agencies is sympathetic, this avenue may prove helpful and gain substantial reforms. This is also especially true if the faculty unions are substantial political players and have sufficient awareness of contingent faculty to have made these inequities public.

Another potential avenue is collective legal action. That would generally begin, as it did with the Cervisi case in California, with either a collective appeal of denials of unemployment benefits through the agency appeals system or the collection of individual appeals that had been filed and the pursuit of them further on a class-action basis. The difference is the point at which they are collectivized. In any case, such a strategy requires an organization, legal assistance, research time and resources (a pot of money), and the political will to sustain a case through the various levels of unemployment appeals into the state courts. Conceivably, if unsuccessful at the state level, the case could make its way into the federal courts as a constitutional challenge on the basis of violation of equal protection under the law. This collective legal strategy has already proven its worth in California with the Cervisi case.

A third avenue at the state level is through the legislative process. Even without a change in the federal legislation's "no reasonable assurance" requirement for eligibility, state legislatures could mandate, based on a finding of fact, that higher education institutions report to the unemployment agency that college teachers without tenure or tenure-track positions do not in fact have reasonable assurance, making it specifically illegal for them to report otherwise. Other state legislative provisions could be pursued depending on the particulars of each state's unemployment laws and the manner in which they are being enforced.

Local level actions

At the local level, local unions can bargain provisions in contracts or side letters

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that mandate employers to tell the truth to unemployment insurance investigators. Such provisions can also designate a particular administrator to handle all such inquiries and therefore make it much easier to police the issue. The union would then advise all its contingents, when filing for unemployment, to list this individual with his or her telephone number as the employer contact on the application forms. Such negotiated agreements, while never iron-clad or perfect, have resulted in substantial improvements in the positive determination without appeals.

Probably the most important action that can be taken at the local level, in addition to supporting and encouraging efforts at the state and national level, is to provide accurate and realistic advice, support, and advocacy to contingent faculty in pursing their claims. That means publicizing the availability and the need for faculty to apply for unemployment benefits in newsletters the month before the teaching term ends. It means offering advice like this manual to contingent faculty on how to apply and appeal if denied. It also means assisting faculty in appeals and providing advocacy for them on an individual and or collective basis. It means publicizing the inequity of this system through other local avenues available to the union, such as local labor councils, public media, local labor and community coalitions, such as Jobs with Justice chapters and their Workers Rights Board hearings, and generally treating this as both a community and a labor issue.

All of the above collective actions need to be accompanied by educational and publicity efforts both within organizations and outside. These efforts should lead to alliances with others who are fighting against cutbacks and injustices in the administration of public benefits, whether unemployment compensation, workers' compensation, TANF (welfare), social security disability income (SSI), public pensions, (SS, teachers pensions, state pensions), or health care. In other words, we must fight together to expand the economic social wage that we all deserve.

Appendix

Some experiences from around the United States

This information was reported from contingents themselves and it has not been possible to fact-check all reports. The following are included to give a sampling of the variations that exist. For their own protection, the names of some contingent informants have been omitted.

ARKANSAS

Contingent letters of assignment are interpreted as bona fide contracts and therefore contingent faculty are uniformly denied benefits if they have received such a letter. This is so even if the letter clearly makes these assignments contingent upon " sufficient enrollment and funding" and that "If a full-time faculty member's class is cancelled because of low enrollment, your class section may be given to a full-time faculty member."

"The one time I was able to get unemployment benefits occurred following a three-semester stint as a full-time instructor—a temporary replacement for a for a full-time, tenured instructor who left on short notice. I was down graded from full-time to part-time status and that downgrading did make me eligible for unemployment insurance benefits. When I tried a year later to claim benefits, I was turned down as was my appeal."
(Anonymous, University of Arkansas at Little Rock.)

CALIFORNIA

As noted in the main text, CA has the Cervisi decision which declares that "an assignment that is contingent on enrollment, funding or program changes is not a 'reasonable assurance' of employment." This has allowed most contingents to successfully claim benefits; however, the problem of employers' giving incorrect information to the unemployment agency has persisted. As a result, a coalition of faculty organizations succeeded in passing two enforcement bills through the

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state legislature. Together, these laws give the unemployment agency in CA the power to penalize an employer who willfully gives incorrect information to the agency about flex-time, first or last day worked or reasonable assurance (AB 2412 and AB 2293). This issue has remained very much "on the table" for local unions and state unions and faculty groups. Many locals send out reminders to apply at the end of each term and have extensive information on their Web sites.

At least one private consulting company (TALX Corporation and their UCeXpress service) is selling their services to higher ed employers asserting that they "can reduce your employer [unemployment] tax costs to a minimum." See their website at *www.talx.com/Services/UCeXpress/*. They are intervening in appeals against contingent faculty claims. They offer to become the "address of record" and handle all unemployment insurance matters for the employer. "In 2003, we removed over $6 billion in unemployment claim liability and recovered over $240 million for our clients." This sort of consultancy arose in higher ed after Cervisi and after large numbers of contingents began to file for and receive benefits.

CONNECTICUT

Some people have successfully collected between terms for years, other have had denials. It seems to depend a lot upon the attitude of the initial interviewer. Even though community college assignment sheets have emblazoned across them "This is not a contract," many are still denied. It is a demeaning process that discourages many from applying again.

COLORADO

State law allows adjuncts to apply. Our informant states, "If the college denies payment, it can be appealed. As far as I know, no one has ever lost an appeal." "A few part-timers apply but not many."

ILLINOIS

The situation is very mixed and in flux. Some employers are now routinely challenging all applications. Some contingents win appeals, some do not. Our bad court decision (Campbell case) is often cited against us in appeals. There is some effort by union locals to inform contingents of their rights and there is discussion of a statewide strategy, which is being launched now through the IEA legislative

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platform and through an NEA funded statewide strategy. Some applicants have found quoting from the recent book on organizing contingents *(Reclaiming the Ivory Tower: Organizing Adjuncts to Change Higher Education,* Joe Berry, Monthly Review Press, 2005) regarding our conditions of employment to be helpful in hearings and investigation interviews. Chicago COCAL is accumulating cases statewide and nationally. Chicago COCAL has assisted many applicants in filing and appealing, as have some union locals, with very mixed results.

MASSACHUSETTS

People usually get benefits and many union locals are helping people file appeals and win if initially denied, which often happens. The grievance coordinator of the MA Community College Council, MTA/NEA regularly helps people and supplies information to claimants. They find that people have to be willing to take any assignment from the college, if offered, to preserve their rights to benefits. "It appears that there is some consistency on the laws and policies in other New England states."

NEW JERSEY

"Unemployment compensation does not just vary state-to-state but even within states where different employers may report differently to the agency. This may be particularly true for privates v. public employers, but even among public institutions in New Jersey there are differences. The adjuncts at the state colleges have difficulty compared to the PTLs at Rutgers. These variations do seem to hang on what constitutes reasonable assurance and in my experience success is often thwarted by the adjunct themselves. They think verbal assurance is [reasonable] assurance, for instance, (and sometimes employers fight about this too), or they worry that claiming will affect future appointments, which it may."

NEW YORK

"The Professional Staff Congress, affiliated with AFT, AAUP and with NEA through the New York State United Teachers, is entering our fourth year of trying to alter legislation that currently prohibits higher education employees from obtaining UI (unemployment insurance benefits) if they have 'reasonable assurance.' Both CUNY and SUNY chancellors have blocked the legislation so far, claiming that granting UI would be too costly for that state and counties."

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WISCONSIN

"Local 6011, [Part-time Teachers Union, AFT], has experienced mixed success with UC [unemployment compensation]. Madison Area Technical College is careful to cover their bases so as to not have to pay all that often. There are 'letters of intent' that are not contracts, but are considered along with the p-t faculty members employment history with MATC by the reviewing panel. Teachers who have been consistently hired each school year could not hope to receive UC over the summer. Teachers with less history have received UC for the summer sometimes. Otherwise, things are on a case-by-case basis. The AFT-Wisconsin attorney on retainer has helped individuals in certain circumstances. We have some information on the union Web site."

WASHINGTON

Washington law appears to give contingents the right to benefits, "… a person is presumed not to have reasonable assurance under an offer that is conditioned on enrollment, funding or program changes. It is the college's burden to provide sufficient documentation to overcome this presumption. Reasonable assurance is determined on a case by case basis…"
http://apps.leg.wa.gov/RCW/default.aspx?cite=50.44.053

There is also an important court case that says that summer is not a vacation period for part-time faculty, WA Employment Security-Evans 72 Wn. App. 862

Another informant states, "Ultimately it is going to take either a state or federal action lawsuit or else federal legislation. We tried to change the law in Washington to match the CA Cervisi decision and the feds came in and threatened to cut off over $1 Billion in annual federal unemployment insurance funds to Washington state. We have changed the law three times in a decade, and adjuncts still get hassled and usually do not get unemployment. Most adjuncts have given up."

TALX, the Colorado-based contractor, is also active in Washington and promotes itself as "a complete solution that limits unemployment tax risk for employers…"

In Washington State the legislature has created a fund for colleges to use to pay unemployment claims, but if the allotment given to a college is not paid out, the college may use those funds for other purposes. Thus, to date, colleges have little to fear in routinely challenging unemployment claims.

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Other Resources

Portela, J. I. 1995. *Don't Lose Your Unemployment Benefits!* Jose I. Portela. New York, NY: Apex Press, imprint of the Council on International and Public Affairs.

The Web site of the California Part-time Faculty Association in the California Community Colleges, *www.cpfa.org/unemployment.html* This site has links to the Cervisi decision and related materials for CA contingent faculty. It is an example of what can be done.

The Web site of the California Faculty Association, affiliated with the CTA/NEA, AAUP, and SEIU, that represents both contingent and tenure track faculty in the huge CA State University system. This is another example of a union giving information to its members on unemployment insurance. *www.calfac.org/unemployment.html*

The compilation of relevant legal decision in the states, "Annotation: The right to unemployment compensation or social security benefits of teachers or other school employees", 1995, American law Reports 5th, 1995, Lawyers Cooperative Publishing, a division of Thomson Legal Publishing. Available through *web2.westlaw.com*

American Association of University Professors, AAUP *www.aaup.org*

American Federation of Teachers, AFT/AFL-CIO *www.aft.org*

National Education Association, NEA *www.nea.org/he*

ADJ-L, the listserve of the COCAL contingent faculty movement. This is a great place to share information, ask questions and generally contact activists all over North America. To subscribe, send a message to either:
lyris@listserv.gc.cuny.edu or *adj-l-request@listerve.gc.cuny.edu*
containing the following command in the body of the message (not subject line): SUBSCRIBE ADJ-L firstname lastname <userid@domain> or email *vtirelli@gc.cuny.edu*

Chicago COCAL *www.chicagococal.org*

California COCAL *COCAL-CA.org* (also the site for August 2008 COCAL VIII conference in San Diego)

Connecticutt COCAL *www.cocal-ct.com*

Oregon COCAL *www.oregoncocal.org*

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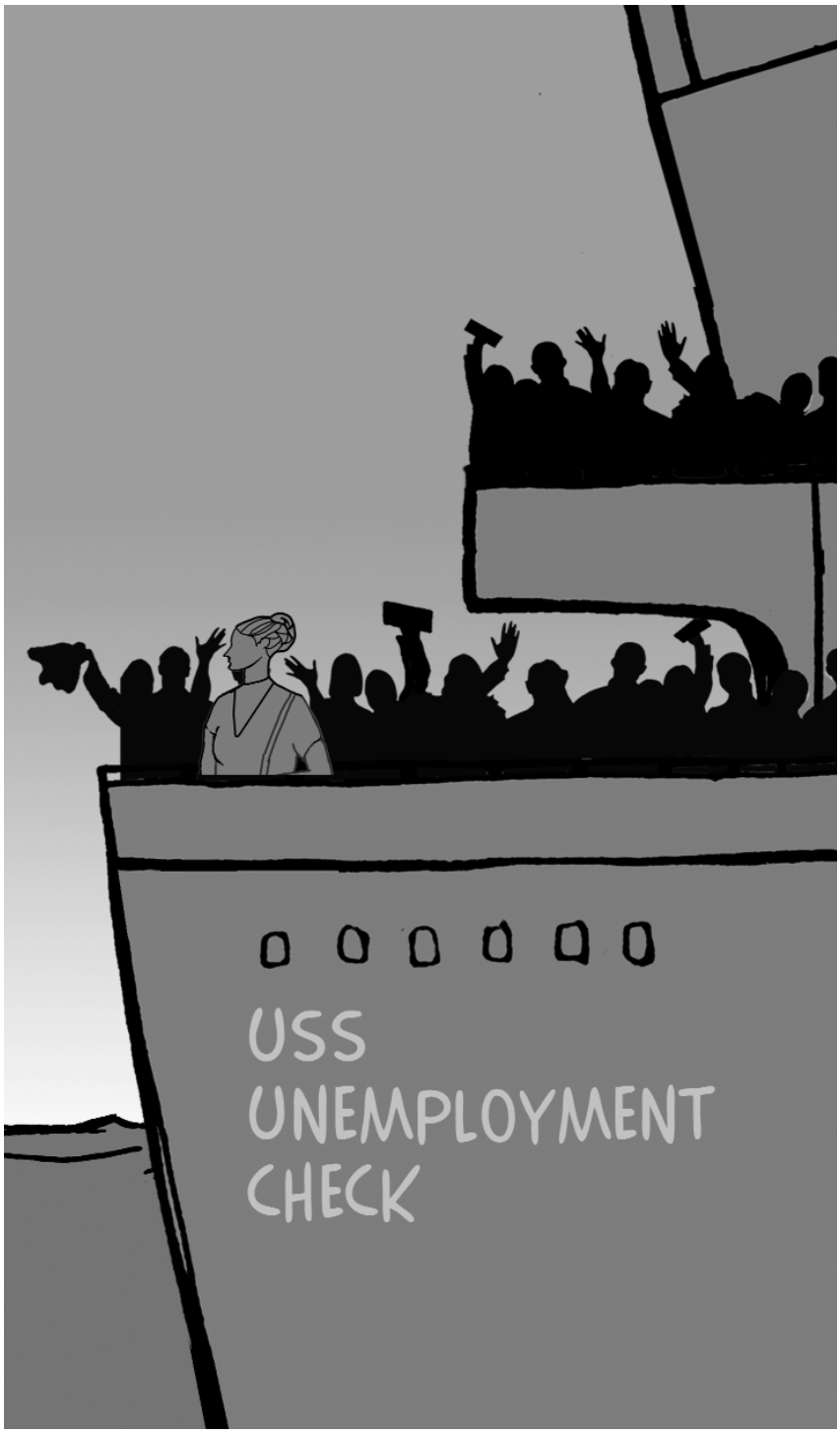
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