OFFICE OF COMPLIANCE
LA 200, John Adams Building, 110 Second Street, S.E.
Washington, DC 20540-1999

BETTY JEAN JOHNSON,	)	
Appellant,	)	
v.	)	
THE OFFICE OF THE ARCHITECT OF THE CAPITOL	)	**Case No. 96-AC-25 (CV)**
Appellee.	)	

Before the Board of Directors: Glen D. Nager, Chair; James N. Adler; Jerry M. Hunter; Lawrence Z. Lorber; Virginia A. Seitz, Members.

DECISION OF THE BOARD OF DIRECTORS

For the reasons stated in the opinions attached hereto, the Board hereby AFFIRMS the decision of the Hearing Officer in this case.

It is so ordered.

Issued, Washington, D.C., May 22, 1998.

Chairman Nager, joined by Member Seitz, concurring in the judgment.

Substantial evidence in the record supports the Hearing Officer's decision on Mrs. Johnson's promotion claim. Substantial evidence in the record also supports the Hearing Officer's decision that principles of preclusion law appropriately bar relitigation of Mrs. Johnson's claim that respondent discriminated against her on the basis of sex in assigning overtime work. Accordingly, the Hearing Officer's decision should be affirmed.

I.

As found by the Hearing Officer, Mrs. Johnson has been employed since 1971 by the Office of the Architect of the Capital ("AOC") in the Night Cleaning Division assigned to the Senate Office Building. See Betty Jean Johnson v. The Office of the Architect of the Capitol, No. 96-AC-25 (Dec. 3, 1996) at 3 (Finding of Fact No. 1) (the "Decision"). She is currently a cleaning supply room worker, WG-6901-04/05. See id. Her primary duties are distributing supplies to custodial workers, cleaning offices, and answering the telephone. See id. During her years of service, she has held a number of job designations, including custodial worker, laborer, linen room and cleaning supply room worker, and has applied for, but has never held, any supervisory positions. See id. (Finding of Fact No. 2).

In 1991, appellant applied unsuccessfully for the position of Custodial Worker Assistant Supervisor, which was awarded to Mrs. Clara Jackson, who had less seniority than Mrs. Johnson. See In the matter of Betty Johnson, Employee v. Architect of the Capitol, Employing Office, SFEP 92-006, (Feb. 12, 1993) at 4, 16-17. In October of 1992, Mrs. Johnson filed a formal complaint, pursuant to the Government Employee Rights Act of 1991 ("GERA"), 2 U.S.C. § 1207 (repealed 1995), with the Office of Senate Fair Employment Practices, alleging that she was denied that promotion on account of religion and that she was unlawfully paid lower wages than a male employee, Mr. Williams, whom she alleged had the same job and performed the same duties as she did. See In the matter of Betty Johnson, Employee v. Architect of the Capitol, Employing Office, (Feb. 12, 1993) at 1, 10, 13.

After counseling and mediation, a formal hearing was held in 1993 and a panel of three Hearing Officers of the Office of Senate Fair Employment Practices (the "Hearing Board") found that her complaint was without merit. See id. at 1, 15-19. Mrs. Johnson appealed to the Senate Select Committee on Ethics (the "Committee"), which affirmed the Hearing Board's determination with respect to the issue of whether appellant was unlawfully discriminated against in the denial of a promotion because of her religion. See In the matter of Betty Johnson, Employee v. Architect of the Capitol, Employing Office, SFEP 92-006, (Apr. 30, 1993), cited in In the matter of Betty Johnson, Employee v. Architect of the Capitol, Employing Office, SFEP 92-006, (July 17, 1993) at 1. The Committee remanded the case with regard to the Hearing Board's decision on the issue of whether appellant was unlawfully discriminated against on the basis of sex in the assignment of overtime work, ordering the Hearing Board to consider the claim in light of the law of disparate impact under Title VII. See id.

On remand, the Hearing Board concluded that the AOC had not unlawfully discriminated

against appellant by placing her on a five day work schedule with no weekend overtime. In the matter of Betty Johnson, Employee v. Architect of the Capitol, Employing Office, SFEP 92-006, (July 17, 1993) at 12. The Committee then affirmed. See In the matter of Betty Johnson, Employee v. Architect of the Capitol, Employing Office, SFEP 92-006, (July 17, 1993) at 2.

Appellant appealed the rejection of her claim of religious discrimination to the Federal Circuit, which affirmed. See Johnson v. Office of Senate Fair Employment Practices, 35 F. 3d 1566, 1570 (Fed. Cir. 1994). She did not appeal the sex discrimination claim. Id. at 1569 n.5.

On January 26, 1996, Mrs. Johnson applied for another supervisory position, that of Custodial Worker Assistant General Supervisor. See Decision at 4 (Finding of Fact No. 4). That position is an advanced supervisory position, which has been described as requiring the ability to supervise some 20 other supervisors, manage more than 100 custodial workers, handle complicated personnel actions, and share the duties of a high-level general supervisor. See id. at 5 (Finding of Fact No. 6.a).

The personnel staffing specialist in the Human Resource Management Division of the AOC, Karen G. Carre, found that four applicants for the position, including Mrs. Johnson, did not meet the minimum job requirements. See id. at 5 (Finding of Fact No. 5.a). Thus, she did not rank those individuals or invite them to participate further in the evaluation and selection process. See id. at 7 (Finding of Fact No. 7.b). Ms. Carre made the determination that Mrs. Johnson was not qualified based on Mrs. Johnson's lack of prior supervisory experience or training, after comparing her written application with the job requirements. See id. at 5, 6 (Findings of Fact Nos. 5.a, 6.a, d).

None of the persons whom Mrs. Johnson alleges are biased against her had any role or influence in Ms. Carre's determination that Mrs. Johnson was unqualified for the job. See id. at 7 (Findings of Fact Nos. 7.c, d). At the time of making that determination, Ms. Carre was unaware of Mrs. Johnson's color or religion or the color or religion of the successful applicant, Clara Jackson, whose previous promotion to a supervisory position Mrs. Johnson had also challenged. See id. at 7 (Finding of Fact No. 7.a).

Mrs. Johnson thereafter filed a claim under section 201 (a)(1) of the Congressional Accountability Act ("CAA"), alleging that the denial of her promotion was based on her color and religion. Prior to hearing this claim, the Hearing Officer assigned to this matter allowed Mrs. Johnson to amend her complaint to include a claim under section 201 that she had been unlawfully discriminated against on the basis of sex in the assignment of overtime work. See Prehearing Order (August 21, 1996) at 1(a).

After receiving the evidence, the Hearing Officer found that Mrs. Johnson had "made a marginal showing" to establish her prima facie case of discrimination respecting her claim of religious and color discrimination in the denial of promotion. Decision at 9 (Conclusion of Law No. 2.b). The Hearing Officer further found, however, that the AOC had provided legitimate

non-discriminatory reasons for its actions, which appellant did not rebut. See id. at 9-10 (Conclusion of Law No. 2). Specifically, the Hearing Officer found that the selection official, Ms. Carre, was unaware of appellant's color or religion, and had determined that Mrs. Johnson did not meet the minimum requirements for the high-level supervisory position for which she had applied because she had no prior supervisory experience or training in the complex personnel duties that the position required. See id. at 5-7 (Findings of Fact Nos. 6-7).

With respect to the overtime claim, the Hearing Officer found that "Mrs. Johnson's allegations of discrimination in overtime policy are barred by her prior litigation and may not be considered by the Office of Compliance." Id. at 10 (Conclusion of Law No. 3). The Hearing Officer based this conclusion on her findings that "Mrs. Johnson's allegations concerning her disparate treatment under the overtime policy of the Architect's Office were decided adversely to her in proceedings filed in 1992" and "that Mrs. Johnson raises the same issues, under the same policy, against the same party in this litigation. One who has had his or her day in court should not be permitted to re-litigate the issue." Id.

II.

In reviewing the Hearing Officer's decision, it is not our role to reweigh the evidence in the present record or to make factual findings of our own. Nor is it our role to decide whether the earlier adjudication of the overtime work assignment claim by the Senate Office of Fair Employment Practices was correctly decided. Rather, under section 406 of the CAA, we perform a limited appellate function: Specifically, the Board may only "set aside a decision of a hearing officer if [it] determines that the decision was --

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;
(2) not made consistent with required procedures; or
(3) unsupported by substantial evidence."

2 U.S.C. § 1406(c). Moreover, in making these determinations, the Board "must review the whole record . . . and due account shall be taken of the rule of prejudicial error." Id. at § 1406(d). Applying these standards according to their well-accepted meaning in the law, the Hearing Officer's decision here may not properly be set aside.

A. The Promotion Claim

First, there is no basis under the standards set forth in section 406 of the CAA for overturning the Hearing Officer's decision respecting Mrs. Johnson's claim of discrimination in promotion. That decision is consistent with the law and supported by substantial evidence.

As to the law, the Hearing Officer quite correctly recognized that "[t]he factual inquiry in a Title VII case is whether the defendant intentionally discriminated against the plaintiff. In other

words, is the employer. . . treating some people less favorably than others because of their race, color, religion, sex, or national origin." United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983) (internal quotations and citations omitted). The "ultimate question" in a case of alleged discrimination on the basis of color and religion is "whether plaintiff has proved that the defendant intentionally discriminated against [her] because of" her color or religion. St. Mary's Honor Center v. Hicks, 509 U.S. 499, 511 (1993) (internal quotations and citations omitted). The Hearing Officer so held, see Decision at 10 (Conclusion of Law No. 2.d), and Mrs. Johnson does not even seriously challenge this statement of the law.

Mrs. Johnson does challenge the Hearing Officer's findings that Mrs. Johnson was not "qualified for the advanced supervisory position which she sought" and that neither "her color or her religion were factors in her failure to obtain this particular position." Decision at 10 (Conclusion of Law No. 2.(d)). But those findings are supported by "substantial evidence" on the record as a whole.

In this regard, the question is not whether we would have made the same decision ourselves or, for that matter, whether there is a "scintilla" of evidence in the record that is contrary to the Hearing Officer's decision. See NLRB v. Nevada Consol. Copper Corp., 316 U.S. 105, 107 (1942); NLRB v. Columbia Enameling & Stamping Co., 306 U.S. 292, 300 (1939). Rather, the question is whether, on the record as whole, there is "such relevant evidence as a reasonable mind might accept as adequate to support [the] conclusion" that the Hearing Officer reached. Consolidated Edison Co. of N.Y. v. NLRB, 305 U.S. 197, 229 (1938). See also Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). The test is the same one that courts apply in determining whether to refuse to direct a verdict or grant judgment notwithstanding the verdict on a factual issue that has been submitted to a jury. NLRB v. Columbian Enameling & Stamping Co., 306 U.S. at 300; NLRB v. Southland Mfg. Co., 201 F.2d 244, 246 (4th Cir. 1952). Under this exceedingly deferential standard of review, the Hearing Officer's decision here must be sustained.

The record contains ample support for the Hearing Officer's finding that the AOC had a legitimate, nondiscriminatory basis for its determination that Mrs. Johnson was "not qualified" for the position of Assistant General Supervisor. This determination was made by a qualified personnel specialist, in accordance with Office of Personnel Management standards and accepted personnel practices, by comparing the requirements for the position, as set forth in the vacancy announcement, with Mrs. Johnson's qualifications, as set forth in her written job application. See, e.g., Tr. at 197, 200-204, 208, 210, 218; see also, Complainant's Exhibit 6; Respondent's Exhibits 1-3.

There is also substantial evidence in the record supporting the Hearing Officer's finding that Ms. Carre was unacquainted with Mrs. Johnson's color or religion when she found that appellant, along with three other candidates, was "not qualified" for the position and for that reason did not forward her application to selection officials for further review. See Tr. at 210, 217-218. Indeed, the record is clear that the selection officials, against whom appellant alleges

bias, did not even consider appellant's application. See Tr. at 210, 221-3.

In short, the record fully supports the Hearing Officer's conclusion that Mrs. Johnson was not denied the promotion because of her color or religion. Accordingly, the Hearing Officer's decision on this claim must be affirmed.

B. Overtime Work Assignment Claim

Likewise, there is no basis for overturning the Hearing Officer's determination that Mrs. Johnson is precluded from relitigating her claim respecting the assignment of overtime work. Under the standards of review set forth in section 406 of the CAA, that decision must be affirmed.

First, the Hearing Officer's decision is not "arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law." It has been established for over a century that a "claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever." Cromwell v. County of Sac, 94 U.S. 351, 352-353 (1876). Moreover, even "where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as a estoppel . . . as to those matters in issue or points controverted, upon the determination of which the [first] finding or verdict was rendered." Id. at 353. These principles of preclusion law have long been applied in adjudicatory proceedings conducted by administrative agencies. See, e.g., United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966). And, while these preclusion principles do not always bar later litigation of claims arising out of "essentially the same course of wrongful conduct," Lawlor v. Nat'l Screen Service Corp., 349 U.S. 322, 327-28 (1955), they do bar relitigation of points "which have remained substantially static, factually and legally." Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 599 (1948). Thus, the Hearing Officer here correctly determined that, where a continuing course of conduct is in issue, the critical question is whether there has been a material change in either subsequent fact or law that was necessary to the prior decision. See, e.g., Peugeot Motors of American. Inc. v. Eastern Auto Distrib., Inc., 892 F.2d 355, 359 (4th Cir. 1989) cert. denied 497 U.S. 1005; Neeld v. Nat'l Hockey League, 439 F. Supp. 446, 450-51 (W.D.N.Y. 1977).

Second, the Hearing Officer's decision here was clearly "made consistent with required procedures." Even though Mrs. Johnson did not challenge respondent's overtime work assignment policies and practices in her initial complaint in this case, the Hearing Officer allowed Mrs. Johnson to amend her complaint prior to the hearing so that she could do so. Moreover, at the outset of the hearing, the Hearing Officer advised Mrs. Johnson that, with respect to respondent's argument that this claim was precluded by a prior adjudication, the critical factual question upon which proof was needed was "whether or not there had been any change in the

overtime since 1992" when Mrs. Johnson previously challenged respondent's overtime work assignment policies and practices. Tr. at 7. The Hearing Officer then received all of petitioner's admissible evidence about the overtime work assignment claim (and respondent's cross-examination of that proof); and she made specific "findings of fact" and "conclusions of law" on the basis of that evidence. Decision at 2-3, 8, 10; see also Tr. 192-194. In short, the Hearing Officer plainly followed procedures that gave Mrs. Johnson every reasonable opportunity to have her overtime work assignment claim heard on the merits; indeed, Mrs. Johnson has never even suggested that the Hearing Officer failed to comply with any procedural requirement of the CAA or its implementing regulations.

Finally, the Hearing Officer's decision cannot properly be said to be "unsupported by substantial evidence." The Hearing Officer found that:

> . . .The testimony here today indicates that although Mrs. Johnson's exact job title might have changed since 1992, she continues to perform the same duties. Further, the testimony today is very clear that the employment practices and procedures with regard to overtime at the Architect of the Capitol offices are the same as they were in 1992, when Mrs. Johnson made her first claim about discrimination in overtime . . . .
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> . . . It is the hearing officer's conclusion that those policies of the Architect of the Capitol with regard to overtime have been the subject of full and complete hearing and have been the subject of litigation. Specifically, the cause was remanded for special hearing by the Office of Fair Employment Practices, and its decision was rendered on July 13, 1993, in which it found that there was justification for the practices and that the practices were not illegal.
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> . . . The hearing officer concludes that [Mrs. Johnson] is barred from relitigating that issue. There has been no change in the facts. She pursued all of her legal remedies, and the issue was decided against her and must, therefore, come to a rest under the principles of law as the hearing officer understands them . . . .

Tr. at 192-94. See also Decision at 2-3, 5, 8. The record as a whole plainly contains "such relevant evidence as a reasonable mind might accept as adequate to support [these] conclusion[s]. . . ." Consolidated Edison Co. of N.Y. v. NLRB, 305 U.S. at 229.

Specifically, with respect to the disparate treatment theory, the Hearing Board had found that, while at that time "all laborers are male and all custodians are females, . . . [b]oth laborer and custodian positions are officially open to all employees, regardless of sex." In the Matter of Betty Johnson v. Architect of the Capitol, SFEP-96-006 (February 12, 1993), at 9. The Hearing Board

also found that:

> . . . custodial workers clean suites in the same manner as if in a home. They dust, empty trash, clean bathrooms, vacuum rugs, etc. Laborers haul trash and clean all public areas, including floors, hallways and stairwells using large vacuums and 30 inch shampoo machines. The job description for laborers requires an 80 pound lifting ability.

Id. In addition, the Hearing Board found that, "[w]hile Mrs. Johnson provides supplies for custodians, Mr. Williams, occupying the job title of material handler, is her counterpart for laborers and is responsible for providing supplies to these workers." Id. at 10. And, most importantly, the Hearing Board also found that:

> . . . The custodial work force is responsible for cleaning non-public areas. Since non-public areas are cleaned on Saturday and receive little use for the remainder of the weekend, there is no need for this group to provide cleaning services on Mondays. Thus, there is no reason for Complainant to work on Monday.
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> . . . By contrast, laborer cleaners are responsible for cleaning public areas, receiving heavy use seven days a week and performing duties which include the operation of machinery and the collection and transport of heavy loads of trash.
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> . . . According to Respondent's policy, to be paid overtime, the employee must have been scheduled to work overtime and must have worked it. To be paid Sunday premium pay, the employee must have worked some part of a Sunday and it must have been part of the employee's regular scheduled tour of duty.
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> . . . Neither of these cases applied to complainant, whereas they did for M[r]. Williams. This accounts for the differential in pay.

Id. at 10-11. The Hearing Board accordingly rejected Mrs. Johnson's intentional sex discrimination claim, reasoning that:

> . . . Although both the Complainant and Mr. Williams were responsible for providing supplies to the custodial workers, Mr. Williams worked a different tour of duty which included additional hours and work on Sundays. Additionally, Mr. Williams also handed out parts, tools, and equipment not handled by the Complainant. As a result, the employer was required to pay him

> both overtime and premium pay. Except for these differentials in pay, both Mr. Williams and Complainant earned the same base salary.

Id. at 17.

In this case, the record reflects, among other things, ample evidence that, pursuant to federal personnel practice regulations, custodian and laborer positions are officially open to all qualified applicants, regardless of sex, and, in fact, that there are now two or three males in the custodial classification. See Tr. at 65, 126. In addition, the record reflects ample evidence that laborers and custodians continue to perform the same "tours of duty" that they performed in 1992 - - i.e., custodial workers still dust, empty trash cans, clean bathrooms, and vacuum rugs in offices and other non-public areas; and laborers still haul large trash trucks and clean public areas, including floors, hallways and stairwells, using large vacuums and 30-inch shampoo machines. See Tr. 50-55, 64-66, 76-78, 123-124, 159-161. Even more importantly, the record in the present case also reflects ample evidence that overtime work continues to be assigned in lesser amounts to the custodians than to the laborers (including Mr. Williams), because there is generally no need for custodians to work seven days a week (since custodians clean non-public areas that generally receive little use over the weekends). See Tr. at 52-54, 123-124; Complainant's Exhibits 11, 13, 24. Indeed, Mrs. Johnson herself testified that her duties were the same in 1996 as the duties that she had in 1992; Mrs. Johnson herself testified and documented that the "tours of duty" in effect in 1992 for all custodians and laborers were still in effect for all laborers and custodians in 1996; Mrs. Johnson herself testified that the policy of assigning overtime work only where congressional schedules required it had not changed since 1992; and Mrs. Johnson's own witness, Hazel Dews, admitted that "most of the departments other than custodial workers" --including those with female personnel - - have been getting overtime work assignments for years. See Tr. at 9-10, 52-53, 123-124, 156-158; Complaint's Exhibits 11, 13, 24. In short, the record is replete with evidence that the material facts have not changed since the time that the Hearing Board previously found that respondent's overtime work assignment policies and practices are without unlawful motivation.

With respect to the disparate impact theory, the Hearing Board noted that, under controlling authority, Mrs. Johnson had to establish a prima facie case "by showing that the employment practices of the AOC wrongfully resulted in an all male labor force" and that "this wrongfully constituted work force deprived her of overtime and premium pay in her position of linen room attendant." In the Matter of Betty Johnson v. Architect of the Capitol Employing Office, SFEP 92-006, at 7 (July 17, 1993). The Hearing Board further noted that, if Mrs. Johnson established a prima facie case, "[t]he burden would then shift to the AOC to establish that the male labor force was the result of business necessity and/or by showing that [Mrs. Johnson] was not wrongfully deprived of benefits as a result of the existence of an all male labor force." Id. at 7. Having so stated the legal tests, the Hearing Board then found that Mrs. Johnson had failed to establish a prima facie case, because "[n]o evidence was introduced as to the comparative ability of the applicants, nor did the Complainant establish that the Custodial

Workers could have handled either the industrial machinery used by the Laborers or lifted the necessary weights, completing the necessary comparison between qualified individuals and the composition of the work force . . . ." Id. at 9. Indeed, among other things, the Hearing Board found that "[m]ost of the work done on overtime Saturdays by the Laborers requires the use of industrial sized equipment and possibly could not have been done by all of the Custodial Workers," id. at 6, and in particular that Mrs. Johnson could not "adequately perform the duties of the Material Handler position (the labor force counterpart to [her] position)," id. at 10. Finally, the Hearing Board held that Mrs. Johnson had "failed to refute the AOC's defense of business necessity," both because "[t]he areas of the Senate Office Buildings[,] the public ones that are regularly used on the weekends, require the Laborers work force to work weekends," and because "[t]he need for qualifications to handle weights of more than 80 pounds and heavy industrial machinery while working in these areas has been proven." Id. at 10.

In this case, the record reflects ample evidence that no new, unlawful selection practice with adverse effect was even being advanced by Mrs. Johnson. Specifically, the record reveals that Mrs. Johnson offered proof of only respondent's workforce composition, vacancies, and selection practices in the 1992-1993 time period; she did not offer proof of workforce composition, vacancies, and/or selection practices subsequent to the Hearing Board's decision, much less in the time period after January 23, 1996 (except, perhaps, to show that there are now males in custodian positions as well). Tr. at 65, 128-129. Moreover, the record reveals that Mrs. Johnson again seeks to establish disparate effect in overtime work assignments by reference simply to the different gender compositions of the laborer and custodial classifications, even though controlling case law requires a comparison between the qualified labor market and the employee population resulting from a particular selection practice. The record reflects ample evidence (a) that the "tours of duty" of employees in these two classifications are very different (i.e, they perform different job functions), (b) that the laborer position requires skills and abilities that differ from those of the custodians, and (c) that "most departments other than custodial workers" - - including departments with female personnel - - in fact get overtime work assignments. Tr. 50-55, 64-66, 123-124, 159-161. Finally, the record reveals that Mrs Johnson is still not prepared to rebut the business necessity of respondent's overtime work assignment practices in the present circumstances, as the record contains ample evidence that laborers still polish floors using heavy industrial machinery, still haul large trash trucks of substantial weights, and still have to work on weekends because the areas that they clean are open to the public seven days a week (whereas the areas that custodians clean generally get little use on weekends). Tr. 50-55, 123-124. In short, the record fully supports the conclusion that the material facts necessary to establish unlawful sex discrimination under a disparate impact theory have not changed.

Accordingly, the case is one in which preclusion principles are properly applied to bar relitigation of Mrs. Johnson's sex discrimination in overtime work assignment claim. The purpose and effect of respondent's overtime work assignment policy and practices have previously been fully and fairly litigated adversely to Mrs. Johnson, and the overtime work assignment policy and practices that Mrs. Johnson now seeks to challenge have been found on substantial record

evidence to be the same as those previously challenged. Thus, this case is like Peugeot Motors of American. Inc., 892 F.2d at 359, in which preclusion law was applied to prevent relitigation of "the same legal claim about the same policies that were litigated and on account of which relief was denied in prior litigation." Just as in Neeld, 439 F. Supp. at 450-51, in which the plaintiff was denied leave to bring a new claim respecting a further denial of employment based on a National Hockey League rule barring players blind in one eye from employment in the NHL, so Mrs. Johnson is barred from bringing a new claim respecting further instances of denial of the opportunity to earn overtime based on respondent's continuing but unchanged overtime policy and practices. As demonstrated above, the issues that Mrs. Johnson seeks to relitigate respecting overtime work assignments raise precisely the same material facts previously determined against her by the Hearing Board. Those points are barred from further litigation because they "have remained substantially static, factually and legally." Sunnen, 333 U.S. at 599.

III.

The dissenting opinion does not purport directly to take issue with the procedures that the Hearing Officer applied in reaching her decision. Nor does the dissenting opinion purport directly to take issue with the prior factual findings and conclusions of law of the Hearing Board. Instead, the dissenting opinion takes issue with the Hearing Officer's conclusion that the material facts have not changed since the Hearing Board rendered its prior decisions and with the Hearing Officer's application of the law of preclusion. In doing so, however, the dissenting opinion simply invents arguments that were not made below and that have not even been advanced by Mrs. Johnson on this appeal. The dissenting opinion thus reaches out to address issues that have not been briefed and that are not properly before us; and, as a consequence, the dissenting opinion errs as a matter of law in its resolution of those issues.

First, contrary to the dissenting opinion's suggestion (at 3), the record does not contain any evidence that the respective duties of laborers and custodians have materially changed since the time of the Hearing Board's prior decision. To be sure, at points in their testimony below, Mrs. Johnson and her supporting witnesses complained: (a) that, in doing their jobs as custodians, they have to carry heavy loads of trash; (b) that some men have had light duty work that some women have not had; (c) that Mrs. Johnson does some of the same tasks that Mr. Williams does; (d) that laborers have not buffed the floors of one Senate office building in the past year; and (e) that the laborers have not moved furniture during the tour of duty that one of the custodians works. See Tr. 36, 64, 77-78. But there is also testimony that laborers are continuing to buff floors in other buildings, Tr. 55, 64; and the rest of the testimony is not limited in any way to the time period subsequent to the Hearing Board's prior decisions. On the contrary, petitioner and her supporting witnesses repeatedly stated that the duties of laborers and custodians -- including the duties of petitioner and Mr. Williams -- have not changed in the intervening years; rather, these witnesses simply offered the same testimony that was made to and found insufficient by the Hearing Board -- to wit, testimony that, from these witnesses' perspectives, the differences in custodial and laborer jobs have never been sufficiently material to justify the differences in overtime work opportunities for employees assigned to those job classifications. See Tr. 9-10,

36-38, 76-78, 123-125, 128-129, 156-158, 159-161. As the Hearing Officer correctly recognized, principles of preclusion law do not allow the Office of Compliance now to reweigh this testimony and thereby establish facts different from those found in Mrs. Johnson's initial action; preclusion principles are designed to prevent just such efforts at relitigation. Indeed, the Hearing Officer found that "[t]here has been no change in the facts," Tr. at 192-194, and those findings are certainly supported by "substantial evidence."

Contrary to the dissent's premise (at 1), the Hearing Officer's factual findings are not undermined in the slightest by her statements that "Mrs. Johnson is barred from relitigating overtime issues," Decision at 2, and that "Mrs. Johnson's allegations of discrimination in overtime policy. . . may not be considered by the Office of Compliance," id. at 10. These statements do not, as the dissent suggests (at 1), show that "the Hearing Officer did not weigh the evidence presented by Mrs. Johnson or consider the credibility of Mrs. Johnson or her witnesses." On the contrary, in context, those statements self-evidently show only that, having found from the weight of the evidence that Mrs. Johnson's "prior litigation involved the same parties, the same policy and the same evidence," Decision, at 2, and that "[t]here has been no change in the facts," Tr. 194, the Hearing Officer would not reconsider the merits of the Hearing Board's prior adverse adjudication of Mrs. Johnson's sex discrimination in overtime work assignment claim. In any event, on appeal, the issue for the Board is not whether the Hearing Officer weighed evidence or made credibility determinations in the course of finding facts. Rather, as the statute makes clear, the issue for the Board is only whether, on the record as a whole, there is "substantial evidence" to support the Hearing Officer's finding that the material facts have not changed. See 2 U.S.C. § 1406 (c). Nothing in the statements that the dissent seizes upon bears on this issue in any way.

Nor does Mrs. Johnson's status as a pro se litigant prevent these factual findings from precluding relitigation of the merits of Mrs. Johnson's sex discrimination in overtime work assignment claim. While courts liberally construe the allegations of a pro se litigant's pleadings, they do not as impartial arbiters of the facts evaluate a pro se litigant's evidence any differently than they evaluate the evidence of a represented litigant. See, e.g., Dozier v. Ford Motor Co., 702 F.2d 1189, 1194 (D.C. Cir. 1983); Jacobsen v. Filler, 790 F.2d 1362, 1363-1365 & n.7 (9th Cir. 1986). Moreover, the Hearing Officer here allowed Mrs. Johnson to amend her pleadings on the eve of trial to include her sex discrimination in overtime work assignment claim; the Hearing Officer advised her at the commencement of the hearing about the facts that were critical to the resolution of the preclusion issue on this claim; and the Hearing Officer fully considered the evidence that Mrs. Johnson offered in deciding that the material facts with respect to this claim had not changed. No more was required or, now that this case is on appeal, is allowed. Accord, Matter of CLDC Management Corp., 72 F.3d 1347, 1352 (7th Cir.) cert. denied sub nom. In re Geschke 117 S.Ct. 166 (1996); Dozier v. Ford Motor Co., 702 F.2d at 1194.

Second, the dissent further errs in suggesting (at 2-4) that, even if there has been no change in the material facts in the interim, the Supreme Court's decision in Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955), bars application of preclusion principles to conduct occurring subsequent to the prior litigation (such as that at issue here). While some (but not all)

courts have interpreted Lawlor to bar application of claim preclusion principles to such subsequent conduct (even where the material facts have not changed), no court of which I am aware has interpreted Lawlor to bar application of issue preclusion principles to such subsequent conduct. On the contrary, all authorities of which I am aware -- including the authorities cited by the dissent – recognize that issue preclusion principles are fully applicable in such circumstances to prevent relitigation of factual issues that have previously been fully and fairly litigated. See, e.g., Perkins v. Bd. of Trustees of the Univ. of Ill., 116 F.3d 235, 237 (7th Cir. 1997); Harkins Amusement Enterprises, Inc. v. Harry Nace Co., 890 F.2d 181, 183 (9th Cir. 1989); Dawkins v. Nabisco, Inc., 549 F.2d 396, 397 n.1(5th Cir.) cert. denied 433 U.S. 910 (1977); see also 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4417, at 154-55 (1981); 2 RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. c, reporter's note at 264-65 (1982). Accordingly, Lawlor has no relevance to the Hearing Officer's conclusion that, since there had been no change in the material facts, Mrs. Johnson should be precluded "from relitigating overtime issues" previously adjudicated by the Hearing Board. Decision at 2; see also id. at 10. And, contrary to the dissent's invective, no "spectre" of "immunity" for "future violations" is raised by that holding, since the conduct in issue has already been fully and fairly litigated and adjudged lawful, and since "[d]istinct conduct is alleged only in the limited sense that every day is a new day . . . ." In re Dual-Deck Video Cassette Recorder Antitrust Litigation, Go-Video, Inc. v. Masushita Elec. Indus. Co., 11 F.3d 1460, 1464 (9th Cir. 1993).

Third, the dissent likewise errs in suggesting (at 5-7) that the earlier adjudication of Mrs. Johnson's sex discrimination in overtime work assignment claim is not entitled to preclusive effect because it was not rendered by an agency acting in a judicial capacity. The earlier adjudication of Mrs. Johnson's claims easily satisfies the tests that courts of law have established for determining whether to give preclusive effect to a judgment of a decisional body, administrative or judicial.

Courts of law recognize that "[t]he essence of judicial decisionmaking" is the "appl[ication] [of] general rules to particular situations." Rivers v. Roadway Express, 511 U.S. 298, 313 (1994). Accordingly, they give preclusive effect to judgments rendered in adjudications where: (a) the parties were provided with notice of the proceedings; (b) the parties had the right to present evidence and argument and rebut the evidence and argument of their opponents; (c) the decisional body decided the controversy by applying general rules to the specific factual dispute involving those parties; (d) the decisional body rendered a judgment containing its final decision; and (e) other procedures -- such as the power to subpoena evidence and/or "substantial evidence" review -- exist as are necessary to ensure that the matter is fairly and conclusively decided. See, e.g., Amoco Production Co. v. Heimann, 904 F.2d 1405, 1410 (10th Cir.) cert. denied 498 U.S. 942 (1990); Long v. Laramie County Community College Distr., 840 F.2d 743, 751 (10th Cir.), cert. denied, 488 U.S. 825 (1988); Yancy v. McDevitt, 802 F.2d 1025, 1028-30 (8th Cir. 1986); Buckhalter v. Pepsi-Cola General Bottlers, Inc., 820 F.2d 892, 895 (7th Cir. 1985). Indeed, according to the RESTATEMENT (SECOND) OF JUDGMENTS, § 83 (1982), these are the "essential elements of adjudication" sufficient for the application of preclusion principles.

The earlier adjudication of Mrs. Johnson's sex discrimination in overtime work assignment claim manifested all of these "essential elements of adjudication" -- and more. Pursuant to the Government Employee Rights Act of 1991 ("GERA"), 2 U.S.C. § 1201 et seq., and rules duly promulgated to implement the GERA, see 128 CONG. REC. S131210-03, Mrs. Johnson received formal notice of each step in the earlier proceedings; the Hearing Board had the right to grant reasonable prehearing discovery and to issue subpoenas to compel the attendance of witnesses and production of documents; Mrs. Johnson had the right to present evidence and argument and to confront respondent's evidence and argument; the Hearing Board conducted a full evidentiary hearing in accordance with the formal adjudicatory procedures of the Administrative Procedure Act; and the Hearing Board decided the controversy by applying a general non-discrimination rule to the facts of the case before it. Indeed, the Hearing Board's decision was subject to appeal both to the Senate Select Committee on Ethics ("Committee") and to the United States Court of Appeals for the Federal Circuit. In short, as required by GERA, the earlier adjudication of Mrs. Johnson's claims was fully judicial in nature and, under accepted legal standards, is entitled to preclusive effect.

In suggesting to the contrary, the dissent argues (at 6) that the Committee's decision cannot be given preclusive effect because it is not an "administrative" or "judicial agency" and "does not . . . act in a judicial capacity." But the adjudication in issue here is really that of the Hearing Board and, accordingly, the dissent's critique of the Committee's capacity for judicial decisionmaking is essentially academic. Indeed, under GERA at the time, Mrs. Johnson could have completely bypassed the Committee and appealed directly to the Federal Circuit. See Johnson v. Office of Senate Fair Employment Practices, 35 F. 3d at 1568 n.3. In any event, the United States Constitution specifically envisions that the Senate may on occasion act in a judicial capacity, see, e.g., U.S. CONST. art. I, § 3, cl. 6 (the Senate "shall have the sole Power to try all Impeachments"); see also Nixon v. United States, 506 U.S. 224, 249-51 (1993) (White, J., concurring) (Senate may delegate its adjudicatory authority to a committee), and the Supreme Court long ago admonished that "[w]hether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent." Ex parte Virginia, 100 U.S. 339, 348 (1880). Under GERA, the Committee plainly performed judicial acts: The Committee heard requests for review of hearing board decisions -- i.e., it reviewed the application of general non-discrimination rules to particular factual disputes. 2 U.S.C. § 1208; see also 2 U.S.C. §§ 1207, 1218. The Committee conducted its review "based on the record of the hearing board "-- i.e., based on a record created through adversary presentations by the parties. 2 U.S.C. § 1208(b). The Committee provided a written statement of the reasons for its decisions. 2 U.S.C. § 1208 (e). And the Committee's decisions could be sustained only if supported by "substantial evidence" and "consistent with law." 2 U.S.C. § 1209 (c). In short, contrary to the dissent's suggestion (at 6) that the Committee was performing an executive function, the Committee's decisional process under GERA plainly manifested the "essential elements of adjudication."

The dissent also errs in stating (at 6) that GERA provided "no standards" for the Committee's decisions. As noted above, GERA embraced certain general non-discrimination rules and created a mechanism for their application in particular factual situations. See 2 U.S.C. §§

1202, 1207, 1208, 1218. Moreover, GERA specifically required that Committee base its decision "on the record" of the hearing board, provide "a written statement of reasons" for its decisions, and render decisions that were "consistent with law" and "supported by substantial evidence." As numerous cases make clear, these requirements provide sufficient standards for decision and "necessitate adversary, adjudicative-type procedures." Independent Bankers Assoc. of Georgia v. Bd. of Governors of the Federal Reserve System, 516 F.2d 1206, 1217 (D.C. Cir. 1975). See also e.g., United States v. Florida East Coast Ry. Co., 410 U.S. 224, 245 (1973); Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1540 (9th Cir. 1993). In suggesting to the contrary, the dissent simply fails to recognize that the Committee was authorized to conduct a de novo review of any case brought before it (and, accordingly, the statutory standards set by GERA were like those applicable to other agencies with de novo review authority, and not like those applicable to this Board and reviewing courts in GERA cases). See, e.g., 29 U.S.C. § 160(c) (specifying adjudicatory standards for National Labor Relations Board); see also Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1228-29 (9th Cir. 1980) (comparing review standards applicable to different agencies).

The dissent's complaint (at 6) that the Committee could only remand a matter once to a hearing board is similarly misplaced. That limitation in no way changed the judicial character of either the Committee's judgments or the proceedings giving rise to such judgments; it simply specified the process and time period pursuant to which the factual record for decision of cases had to be made. See 2 U.S.C. §§ 1208 (c), (d). Moreover, there is no basis for the dissent's speculation (at 6) that this limitation "may have affected Mrs. Johnson's proceedings," both because the burden of proof issue to which the dissent refers could conceivably have affected only one of multiple independent grounds for the Hearing Board's decision, and because the Committee ultimately decided that the Hearing Board's decision could be affirmed on the basis of the existing record and Mrs. Johnson elected not to exercise her right to appeal that judgment to the Federal Circuit. Indeed, the dissent's speculation that the Committee's decision may have been in error is an inappropriate basis for refusing to accord that decision preclusive effect; the purpose of preclusion rules is to achieve finality and to prevent such efforts at relitigation of previously determined issues.

The dissent further errs in its contention (at 6) that the senatorial status of the Committee's members is inconsistent with the Committee's acting in a judicial capacity. As noted above, under established precedent, the determination whether an act is judicial in nature must be made by reference to the character of the act, not by reference to the character of the actor. See Forrester v. White, 484 U.S. 219, 228-29 (1988). Moreover, while there are important constitutional, policy and political reasons both for appropriately separating judicial and executive (and legislative) powers and for subjecting those authorities to appropriate checks and balances, as the Administrative Procedure Act and myriad judicial decisions make clear, if adjudicative powers may constitutionally be conferred on an entity, that entity need not be "separate" or "independent" from other agency or governmental officials in order to render legally-enforceable decisions that are entitled to preclusive effect. See, e.g., 5 U.S.C. § 557(b); Withrow v. Larkin, 421 U.S. 35, 46-55 (1975). Rather, the adjudicative body need simply be "impartial" -- i.e., without a personal,

financial or official interest in the outcome of the particular proceedings. Withrow, 421 U.S. at 46. See also Kremer v. Chemical Const. Corp., 456 U.S. 461, 477-81 (1982); RESTATEMENT (SECOND) OF JUDGMENTS, § 83 cmt. b, at 269 (1982). As the dissent effectively concedes (at 7 n.4), however, there is no plausible argument that the Committee -- which was not a party to the proceeding, had no stake in the employment decision at issue, and had no oversight or appropriation responsibilities for respondent -- lacked such impartiality in reviewing Mrs. Johnson's case.

Finally, there is no merit to the dissent's suggestion (at 7) that the "interests of justice" require denying preclusive effect to the earlier adjudication of Mrs. Johnson's claims. As the Supreme Court stated in rejecting this same kind of argument:

> [W]e do not see the grave injustice which would be done by the application of accepted principles of res judicata. "Simple justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata." Heiser v. Woodruff, 327 U.S. 726, 733 (1946). . . .[R]eliance on 'public policy' is similarly misplaced. This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." Baldwin v. Traveling Men's Association, 283 U.S. 522, 525 (1931). We have stressed that "[the] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts. . . ." Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299 (1917).

Federated Dep't Stores v. Moitie, 452 U.S. 394, 401 (1981).

In suggesting to the contrary, the dissent relies (at 2-4, 7-8) on cases and authorities that question the propriety of applying claim preclusion principles to continuing conduct. But, as noted above, no authority of which I am aware questions the propriety of applying issue preclusion principles to continuing conduct; and the Hearing Officer plainly applied issue preclusion principles to prevent the retrial of facts that Mrs. Johnson previously had a full and fair opportunity to litigate.

The dissent also suggests (at 8) that the CAA somehow requires that Mrs. Johnson have an opportunity to relitigate whether respondent's overtime work assignment practices have an unlawful motive or effect. But statutes are presumed to embrace common law principles of preclusion, Astoria Federal Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 107-08 (1991), and the dissent does not point to anything in the CAA that could even conceivably rebut that interpretive presumption. On the contrary, the CAA expressly preserved the right of Senate employees to use the processes established by GERA for resolving certain claims arising both before and after the effective date of the CAA. See 2 U.S.C. § 1435 (a). Moreover, while the CAA arguably may have promised covered employees that new, more expansive rights and remedies would be available to them after January 23, 1996, there is absolutely no evidence that the CAA promised covered employees such as Mrs. Johnson that they could relitigate issues that they had previously had a full and fair opportunity to litigate. Rather, if the Board is "to assure both the perception and reality of fair and impartial decision-making, in parity with other employees in the Nation,"(dissenting opinion at 8) the Board must apply to Mrs. Johnson's case the preclusion rules that are applicable to all other litigants and cases. With all respect, that is the goal of the CAA.

IV.

Accordingly, the decision of the Hearing Officer must be affirmed in all respects that it has been challenged on appeal.[1]

Issued, Washington, D.C., May 22, 1998.

[1] During pretrial proceedings, the Hearing Officer ruled that Mrs. Johnson could proceed only on a claim of discrimination under Title VII, as applied by section 201 of the CAA, stating that "[a]lthough provisions of the Fair Labor Standards Act, as made applicable under CAA § 203 (2 U.S.C. § 1313), were referenced during the August 20, 1996 [prehearing] proceeding when discussing the overtime issues, [Mrs. Johnson] does not articulate orally or in writing a claim under FLSA . . . . " Prehearing Order (August 21, 1996) at 1(a). Mrs. Johnson did not appeal this ruling.

Member Hunter, concurring in the judgment.

I agree that substantial evidence in the record supports the Hearing Officer's decision respecting Mrs. Johnson's promotion claim. I also agree that the Hearing Officer correctly decided that if there has been no material change in the facts respecting the assignment of overtime work, preclusion principles bar the relitigation of that issue. I further agree that substantial evidence in the record supports the Hearing Officer's finding that there has been no material change in the relevant facts.

While I may have decided this matter differently if I was sitting as the Hearing Officer or if the standard of my review was de novo, this is clearly not the case herein. As stated by Chairman Nager, in reviewing the Hearing Officer's decision, the Board performs a limited appellate function. Specifically, the Board may only "set aside a decision of a Hearing Officer if [it] determines that the decision was –

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; and

(3) unsupported by substantial evidence."

2 U.S.C. § 1406(c). Applying the above standard of review, the Hearing Officer's decision may not properly be set aside.

Issued, Washington, D.C. May 22, 1998.

Members Adler and Lorber, concurring in the judgment in part and dissenting in part.

We agree that substantial evidence in the record supports the Hearing Officer's decision on Mrs. Johnson's promotion claim. We thus concur in that part of the Board's judgment. We respectfully dissent, however, from that part of the Board's judgment which affirms the Hearing Officer's decision that principles of preclusion bar the litigation of Mrs. Johnson's claim that respondent discriminated against her on the basis of sex in assigning overtime work. We would have remanded that issue to the Hearing Officer in order that the AOC could present its defense to Mrs. Johnson's allegations including her prima facie showing that the AOC maintained a job classification system in which there are predominately "men's" jobs and "women's" jobs and in which an employee's overtime opportunities appeared to be substantially linked to the employee's classification, and hence to the employee's sex. The Hearing Officer could then have weighed the evidence as she did with regard to Mrs. Johnson's promotion claim and rendered a decision on the merits.

We recognize, of course, that our authority to review the Hearing Officer's decision is limited by section 406 of the CAA but 406(c)(1) and our own Rules not only empower the Board to set aside decisions which are "not consistent with law," but require the Board to do so. For the reasons set forth below, we would hold that the Hearing Officer erred in holding that "Mrs. Johnson's allegations of discrimination in overtime policy are barred by her prior litigation and may not be considered by the Office of Compliance." Decision at 10 (Conclusion of Law No. 3) (emphasis added).

The contrary decision of the majority of the Board is premised upon the majority's conclusions that the Hearing Officer weighed the evidence presented by Mrs. Johnson and therefore that the Hearing Officer's conclusions must be accepted if they are supported by substantial evidence. The majority's premise, however, is directly contradicted by the Hearing Officer's actions and the explicit language of her decision which is before us. Thus, in granting the AOC's preclusion motion at the close of Mrs. Johnson's case-in-chief, the Hearing Officer explicitly acknowledged that she did not and would not consider the evidence before her because of her views with regard to preclusion. The Hearing Officer's decision in this regard could hardly be more clear. Not only did she explicitly hold that "Mrs. Johnson's allegations of discrimination in overtime policy . . . may not be considered by the Office of Compliance," Decision at 10 (Conclusion of Law No. 3) (emphasis added), but also the Hearing Officer observed at an earlier point in her decision that "Mrs. Johnson is barred from re-litigating overtime issues." Decision at 2 (emphasis added). Because of these explicit determinations, it must be concluded that the Hearing Officer did not weigh the evidence presented by Mrs. Johnson or consider the credibility of Mrs. Johnson or her witnesses; either of which would have constituted a re-litigation. Instead, the Hearing Officer found that her "allegations" could not be "considered." In so holding, the Hearing Officer erred for each of the following reasons:

1. *Res judicata*[2] Ought Not Be Applied Where Allegations Concern Subsequent Conduct, Especially Where, As Here, The Allegations Have Been Made By A Pro Se Claimant.

Several principles are applicable here. First, the allegations of a pro se litigant are to be treated liberally. See, e.g., Dawkins v. Nabisco, Inc., 549 F.2d 396, 397 (5th Cir.), cert. denied, 433 U.S. 910 (1977); Casavantes v. Cal. State Univ., 732 F.2d 1441, 1442 (1984) (applying principles that Title VII is a "remedial statute to be liberally construed in favor of the victims of discrimination" and that "a liberal construction is particularlly appropriate in situations in which the complainant is acting pro se") (internal quotations omitted). Second, *res judicata* may not be applied where a claimant's second action relates to conduct which occurred after the claimant's initial litigation, at least where there have in the interim been material changes in the facts relating to the conduct challenged. Lawlor v. Nat'l Screen Service Corp., 349 U.S. 322, 328-29, 75 S. Ct. 865, 868-69 (1955); Perkins v. Bd of Trustees of the Univ. of Ill., 116 F.3d 235, 236-37 (7th Cir. 1997) ("The District Court's approach implies that, having prevailed against the challenge to one civil service exam, the University could discriminate against Perkins with impunity for the rest of his life. That cannot be right.")

Moreover, even where there has not been a material change in facts in the interim, courts have frequently refused to find preclusion where important public policies, such as those embodied in the Civil Rights Act or in the antitrust laws, are concerned. Thus, Lawlor has been interpreted to allow subsequent Title VII and antitrust actions with regard to subsequent periods of time without requiring other factual changes. See, e.g., Blair v. City of Greenville, 649 F.2d 365, 368 (5th Cir. 1981) (Subsequent class action on behalf of Black firemen not barred: *Res judicata*, even where there has been "a valid, final judgment" "rendered on the merits" "does not, however, bar a suit based on acts of the defendant that have occurred subsequent to the final judgment asserted as a bar. . . . A subsequent wrong constitutes a new cause of action."); Cellar Door Prods., Inc. of Mich. v. Kay, 897 F. 2d 1375, 1378 (6th Cir.), cert. denied, 498 U.S. 819 (1990) (Subsequent antitrust action based upon same alleged arrangement which had been challenged unsuccessfully in first action permitted based upon alleged violations occurring subsequent to the dismissal of the first action: "Each time the arrangement precluded Cellar Door from competitively bidding for an event, a cause of action may have accrued to Cellar Door. Therefore, as in Lawlor and Cream Top [383 F. 2d 358 (6th Cir. 1996)], those causes of action that arose subsequent to the 1983 dismissal are not barred by *res judicata*.") See also, PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 334c at 120 (rev. ed.1995) ("This judicial willingness to re-examine matters formerly litigated rests on the premise that the defendant should not be able to use a former judgment as a means of gaining immunity from a change in the law or of assuring himself a permanent advantage over his competitors."); cf. Bazemore

[2] We use *res judicata,* as courts generally have, to include both claim and issue preclusion.

v. Friday, 478 U.S. 384, 395-96, 106 S.Ct. 3000, 3006 (1986) ("Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII.").

Application of these principles precludes the application of *res judicata* here with regard to Mrs. Johnson's overtime claims. Not only was she a pro se plaintiff whose allegations should be interpreted liberally, see, e.g., Mahroom v. Hook, 563 F.2d 1369, 1375 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978), but also the evidence she presented -- essentially her allegations -- reveals that there were alleged factual distinctions between the 1990-92 time period involved in Mrs. Johnson's first action, as compared to those existing after January 23, 1996. Thus, at the hearing, Mrs. Johnson presented evidence that the male laborers performed less demanding physical work than the predominantly female custodians, e.g., Tr. at 64, 77-78; that the women were required to lift trash cans weighing "a hundred pounds or more," Tr. at 78; that Mrs. Johnson did the same (or more) work than her male "counterpart," Tr. at 36; and that the male laborers did not now perform some of the heavy lifting which had been found to distinguish the jobs in the previous litigation, that is, they had not buffed the floors in the "old building . . . this year," Tr. at 64, nor moved any furniture during the night shift, Tr. at 77. These allegations should have been "considered," particularly in light of Mrs. Johnson's difficulty, as a pro se claimant, in fully articulating her allegations. Not to have done so raises the specter of the very immunity with which the Supreme Court was concerned in Lawlor:

> While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even exist or which could not have possibly been sued upon in the previous case. . . . Particularly is this so in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action. Acceptance of respondents' novel contention would in effect confer on them a partial immunity from civil liability for future violations. Such a result is consistent with neither the antitrust laws nor the doctrine of *res judicata*.

349 U.S. at 328-329, 75 S. Ct. at 868-869.

Precisely the same principles have been found applicable with regard to Title VII litigation. E.g., Dawkins, 549 F.2d at 397 and Blair, 649 F.2 at 368. Indeed, to paraphrase the Supreme Court in Lawlor, acceptance of the AOC's contentions would confer upon the AOC a partial immunity from civil liability for future violations with regard to overtime assignments concerning Mrs. Johnson. Such a result is consistent neither with civil rights laws nor the doctrine of *res judicata*.

Our difference with the majority in this regard does not derive from a confusion on our part between claim or issue preclusion. Rather, we interpret Lawlor and the other decisions we have cited as recognizing that subsequent conduct may raise new issues precisely because the "conduct occurred in a different time period." Harkins Amusement Enterprises, Inc. v. Harry Nace Co., 890 F.2d 181, 183 (9th Cir. 1989). Obviously, Mrs. Johnson could not in1992 have litigated before the Senate Select Committee on Ethics her allegations with regard to the post-January 23, 1996 conduct of the AOC.[3]

We also, as we said at the outset of our opinion, cannot accept the majority's conclusion that the "Hearing Officer fully considered the evidence that Mrs. Johnson offered in deciding that the material facts with respect to this claim had not changed." Principal concurrence at 11. Neither of the premises embedded in this conclusion are supported by the hearing Officer's decision: She did not "fully consider[] the evidence" and she did not find that "the material facts with respect to this claim had not changed." Indeed, she specifically held that "Mrs. Johnson's allegations of overtime policy . . .may not be considered," Decision at 10 (emphasis added), and that "Mrs. Johnson is barred from relitigating overtime issues" Decision at 2. Without considering or relitigating these issues, the Hearing Officer could not possibly have "fully considered the evidence" concerning this issue. That the Hearing Officer was true to her words that she would not consider this evidence is dramatically illustrated by comparing her Findings of Fact dealing with the promotion claim (primarily Decision at 3-7 (Findings of Fact 2-7)) with those dealing with the overtime claim (primarily Decision at 8-9(Finding of Fact 8)). With regard to the promotion claim, the Hearing Officer finds, for example, that "Mrs. Johnson was not qualified for the position of custodial worker assistant-general supervisor" and that "[c]olor and religion were not factors when Mrs. Johnson was found 'not qualified.'" Decision at 5, 6. These specific findings are then supported by even more detailed factual analysis. See id.

By contrast, with regard to the overtime issue, there are no comparable Findings of Fact reflecting fully considered evidence, and there is no finding in the Hearing Officer's decision that the material facts with respect to this claim had not changed. Instead, the Hearing Officer focused only on the fact that Mrs. Johnson's "allegations" "are the same," i.e., in both time periods Mrs. Johnson "complained about the disparate impact of the overtime policies of the Architect's Office," Decision at 8, and that she offers "some of the

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[3] Nor could Mrs. Johnson have litigated before the Senate Select Committee an Equal Pay Act claim since the Equal Pay Act was not made applicable to legislative branch employees under GERA. "Although provisions of the Fair Labor Standards Act, as made applicable under CAA § 203 (2 USC § 1313) were referenced during the August 20, 1996 proceeding when discussing the overtime issues," the Hearing Officer concluded that "complainant does not articulate orally or in writing a claim under FLSA. . . ." Pre-Hearing Order of August 21, 1996 at 1(a). Accordingly, the Hearing Officer limited Mrs. Johnson to the presentation of claims under Title VII, as made applicable by the CAA. The record before us is insufficient to determine whether Mrs. Johnson's allegations stated a claim under the FLSA, as made applicable by the CAA.

same evidence which she used in the prior litigation" in attacking the AOC's overtime policy which Mrs. Johnson conceded to be "the same today as it was in 1992." Id. However, even the majority concedes that preclusion principles could not bar Mrs. Johnson's current action although the policy was the same (i.e., almost all overtime was assigned to classifications predominantly filled by male employees) and the allegations were the same (i.e., that such assignments had a disparate and unlawful effect upon women) if there had been a material change in the job duties since 1992. But the Hearing Officer's refusal to "consider" the evidence in the proceeding because of the sameness of the allegations, policy and parties precluded inquiry into the question of whether there had been a material change in the actual duties of the relevant employees in the relevant classification. All the Hearing Officer found in her decision was that "some" of the evidence was the same. Decision at 8 (emphasis added). Moreover, the majority appears to concede that some of the evidence also pointed in a different direction. Under these circumstances, Mrs. Johnson's evidence should have been weighed[4] and a clear decision rendered. Mrs. Johnson's right to have her allegations fully considered should not be snuffed out based upon a presumption that the Hearing Officer fully considered the evidence, especially when that presumption is inconsistent with the structure and content of the Hearing Officer's decision and her explicit Conclusion of Law that "Mrs. Johnson's allegations of discrimination in overtime policy were barred by her prior litigation and may not be considered by the Office of Compliance." Decision at 10 (emphasis added). It is indeed ironic that the majority can affirm the Hearing Officer only by characterizing the Hearing Officer's decision in a manner completely inconsistent with the explicit language and careful structure of the Hearing Officer's own decision.

2. The Adjudicatory Procedures Which Existed With Regard To Senate Employees, Including Mrs. Johnson, Prior To The Enactment Of The Congressional Accountability Act Were Not Of A Judicial Nature, As Required For The Application Of *Res Judicata*.

Res judicata is a judge-made principle to prevent repeated litigation. Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597, 68 S.Ct. 715, 719 (1948). However, not all litigation is entitled to preclusive effect. Thus, the Supreme Court has recognized that preclusive effect is appropriately given to determinations by administrative agencies:

> when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate. . . .

Astoria Federal Savings & Loan Ass'n. v. Solimino, 501 U.S. 104, 107, 111 S. Ct. 2166, 2169 (1991) (emphasis added) (quoting United States v. Utah Construction & Mining Co.,

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[4] See Harkins, 890 F.2d at 183 ("[E]ven if the complaint were read as narrowly as the defendant's wish, the plaintiff alleges facts which by defendant's own concessions are at least 10 percent different.").

384 U.S. 394, 422, 86 S. Ct. 1545, 1560 (1966)).

We recognize that in her prior litigation, Mrs. Johnson had an opportunity to litigate with regard to her contentions of discrimination during the 1990-92 time period. The Senate Select Committee on Ethics, however, in discharging its responsibilities under the Government Employee Rights Act of 1991 ("GERA"), 2 U.S.C. § 1201 et seq.,("GERA"), is not an "administrative" or judicial agency and it does not purport to act in a judicial capacity. Thus, for example, GERA provided no standards with regard to the Senate Ethics Committee's review of its Hearing Board, providing only that its review should be based on the record before the Hearing Board. 2 U.S.C. § 1208(b) (repealed 1995). This omission could not have been an oversight, for in its very next section, GERA provided explicit standards for court review of the decision of the Senate Select Committee on Ethics. 2 U.S.C. § 1209(c) (repealed 1995). Moreover, GERA authorized the Senate Select Committee on Ethics to remand a matter to its Hearing Board only once, 2 U.S.C. § 1208(c) (repealed 1995), a limitation which may have affected Mrs. Johnson's proceedings, for the second decision of the Senate Select Committee on Ethics stated that in future decisions "the Committee suggests that the Hearing Board, when dealing with a disparate impact claim, analyze in its order the issues related to the applicability of the burden of proof standard as set forth in the Civil Rights Act of 1991." In the matter of Betty Johnson, Employee v. Architect of the Capitol, Employing Office, SFEP 92-006, (October 22, 1993) at 2.

Finally, although GERA provided that the members of the Hearing Board should be "3 independent hearing officers" who were not to be "Senators or officers or employees of the Senate," GERA § 1207(b) (repealed), no such independence was possible with regard to members of the Select Committee on Ethics, all of whom were Senators. Thus, the limitations of GERA, while fully consistent with that Committee's exercising the constitutional power of the Senate to determine "the Rules of its Proceedings," U.S. CONST., art. I, § 5, cl. 2), were not consistent with the Committee's acting in a judicial capacity.

By contrast, when Congress, through the CAA, conferred the power to act in a judicial capacity upon an instrumentality of Congress, the Board of Directors, it did so with great care, creating an administrative agency and providing explicitly that the Office of Compliance was to be an "independent" office. Moreover, explicit standards of review were provided not only for court review of the decisions of the Board of Directors but also for the Board's review of its Hearing Officers. See, CAA §§ 301(a) and 406(c). And, of course, the Board of Directors, like a court, is not limited in the number of times it may remand a matter. Thus, because the Senate Select Committee on Ethics exercised the executive powers of the Senate, not judicial powers, its decision may not be given preclusive effect.

In challenging this analysis and our conclusion that the Senate Select Committee on Ethics exercised the executive powers of the Senate, the Board's majority overlooks the fact that GERA provided the same procedures whether the respondent was an instrumentality of the Senate or a Senator himself or herself. Yet GERA itself appears to recognize that in a

proceeding involving a Senator, the members of the Senate Select Committee on Ethics would not be "independent" and GERA was amended to require review by the Senate Select Committee on Ethics thus insuring that in the future any decision to be reviewed by the Federal Circuit would be that of the Committee. Because there is no suggestion that the Senate Select Committee on Ethics exercised judicial authority before these amendments but the executive authority of the Senate only thereafter, the majority decision is internally inconsistent. The majority cannot argue that our "critique of the Committee's capacity for judicial decision making is essentially academic" because " the adjudication in issue here is really that of the Hearing Board," principal concurrence at 12, and yet also contend that the procedures do not suffer the limitations we perceive because the "Committee was authorized to conduct a de novo review of any case brought before it," principal concurrence at 13.[5]

3. The Interests Of Justice Require Denying Preclusive Effect To Mrs. Johnson's Proceedings Under GERA.

It has been well-recognized that very limited exceptions to the rules with regard to claims and issue preclusion have been recognized in the interests of justice. As 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4415 at 121-22 (2nd ed. 1981), recognizes:

> Claims preclusion rules reflect an unavoidable tension between conflicting forms of justice by litigation. The values of repose and reliance are gained at the expense of denying the opportunity to litigate matters that never have been litigated and that may involve valid claims.

However, although the authors of Federal Practice and Procedure generally disfavor such exceptions, even they acknowledge that "continuing conduct may deserve particularly careful examination before claim preclusion is applied to separate statutory claims." Id. at § 4411, at 89. Here, even if the majority were correct that there had been no material changes in the duties of Mrs. Johnson or her co-workers, Mrs. Johnson's claims would be precisely of this type: They would involve repetitive or continuing conduct and separate statutory claims. Thus, the Architect of the Capitol, based upon litigation under GERA concerning job assignments in 1991 and 1992, seeks to preclude Mrs. Johnson from litigating under the Congressional Accountability Act alleged discriminatory overtime assignments which were

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[5] Our conclusion in no way impugns the diligence of the Senate Committee in fulfilling its obligations under GERA; the Committee's diligence in meeting its obligations is unquestioned. Indeed, it was the Committee which initially remanded this matter to the Hearing Board and it was the Committee, upon its second review of the Hearing Board, which recognized the change in the underlying law which was apparently missed by the Hearing Board. However, the Committee is neither a judicial nor an administrative agency and the Committee under the GERA could not act in a judicial capacity; these are the critical elements in this analysis.

made after January 23, 1996, when the CAA became effective. Obviously, Mrs. Johnson could not in her earlier action have challenged assignments made after January 23, 1996, nor could she in this prior litigation have taken advantage of the substantive and procedural provisions which the Congressional Accountability Act prescribes to ensure independent decision-making.

As the Fifth Circuit reasoned in Dawkins:

> Were we to rule that the 1973 adjudication was somehow dispositive of the factual dispute regarding alleged subsequent retaliation, a company that had once won a suit alleging retaliation for participation in Title VII proceedings would be free to retaliate at will against the earlier plaintiff without fear of being held accountable for its actions. The law of *res judicata* establishes no such result.

549 F.2d at 397. So here, the overtime assignments made by the AOC after January 23, 1996 should be reviewed on the merits under the Congressional Accountability Act, as opposed to being precluded by litigation which took place with regard to a prior period under a different -- and now largely repealed -- statutory regime.

In enacting the CAA, Congress promised covered employees that the new, more expansive rights and remedies of the CAA would be available to them after January 23, 1996. That promise should benefit all claims and all covered employees after January 23, 1996, not all claims and all covered employees other than those of Mrs. Johnson with regard to the assignment of overtime.

The goal of the CAA, which embodies the almost unanimous intent of Congress, was to assure both the perception and reality of fair and impartial decision-making, in parity with other employees in the Nation. We believe that the actions taken today by the Board's majority are inconsistent with those goals.

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