

## Ageism v. Capitalism, A Motive for Discrimination

By: Michael Dewing

### Introduction

The story of age discrimination as interpreted by civil justice is told by analyzing the current structure of laws highlighting specific Supreme Court cases along with our U.S. Congress chiming in and attempting to further address the fairness in the rule of law governing the specifics of the EEOC procedural steps and how appellate courts may consider factors relating to the analogous terminology. Further study is warranted and justified by statistical data points and analysis in the way ageism is defining our labor force and our economic system with a focus on age discrimination, giving particular attention to time, age, and experience.

### 2019 Millennials v. Boomers 1960's

An excerpt from *Richard Fry's Millennials projected to overtake Baby Boomers as America's largest generation*, reads,

- Millennials are on the cusp of surpassing Baby Boomers as the nation's largest living adult generation, according to population projections from the U.S. Census Bureau. As of July 1, 2016 (the latest date for which population estimates are available), Millennials, whom we define as ages 20 to 35 in 2016, numbered 71 million, and Boomers (ages 52 to 70) numbered 74 million. Millennials are expected to overtake Boomers in population in 2019 as their numbers swell to 73 million and Boomers are expected to decline to 72 million. Generation X (ages 36 to 51 in 2016) is projected to pass the Boomers in population by 2028. **Boomers** – whose generation was defined

by the boom in U.S. births following World War II – are aging and their numbers shrinking in size as the number of deaths among them exceeds the number of older immigrants arriving in the country. Because generations are analytical constructs, it takes time for popular and expert consensus to develop as to the precise boundaries that demarcate one generation from another. **Millennials-** With immigration adding more numbers to this group than any other, the Millennial population is projected to peak in 2036 at 76.2 million. Thereafter, the oldest Millennial will be at least 56 years of age and mortality is projected to outweigh net immigration. By 2050 there will be a projected 74.3 million Millennials. **Generation X-** For a few more years, Gen Xers are projected to remain the “middle child” of generations – caught between two larger generations, the Millennials and the Boomers. Gen Xers were born during a period when Americans were having fewer children than in later decades. When Gen Xers were born, births averaged around 3.4 million per year, compared with the 3.9 million annual rate from 1981 to 1996 when the Millennials were born. Though the oldest Gen Xer was 51 in 2016, the Gen X population is projected to grow for a couple more years. Gen Xers are projected to outnumber Boomers in 2028, when there will be 64.6 million Gen Xers and 63.7 million Boomers. The Census Bureau projects that the Gen X population will peak at 65.8 million in 2018. **Baby Boomers-** Baby Boomers have always had an outsize presence compared with other generations. They peaked at 78.8 million in 1999 and have remained the largest living adult generation. There were an estimated 74.1 million Boomers in 2016. By midcentury, the Boomer population is

projected to dwindle to 16.6 million.<sup>1</sup>

### **Consensus Building**

Today's corporate climate and best business practice mirrors that of our legislature and judiciary. Where one moves, others will follow to build upon the consensus of how best to balance the economic system. Those include areas of law addressing the issues of our civility and civil rights built into the framer's constitutional promise, followed by the amendments and statutes determined to benefit our aging society and the ageless democracy on which the precedents have been supported. Good governance begins at home, here in our working democracy in every house in America. The country is a working model originally built on the premise and promise of fair and ethical treatment of citizens, along with the kind of representation that embodies those principles. Today we look at market performance and sensationalized information as a benchmark of our values. This speaks to how an entire country has been depreciating its human capital through a devaluation of rights and applying different standards to people based upon class distinctions. There are questions emerging concerning whether or not we are becoming a separatist society.

Patriotism is a feel-good slogan and a marketing campaign for those that feed on our intellectual curiosity and our empathy for the weak. Belief systems have been with man since the dawn of our time. We are all getting older. And according to Cary Franklin, this is the age of

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<sup>1</sup> Fry, Richard, *Millennials projected to overtake Baby Boomers as America's largest generation*, March 1, 2018, "<http://www.pewresearch.org/fact-tank/2018/03/01/millennials-overtake-baby-boomers/>", (last visited on 10/14/2018.)

crippling discriminatory animus with extreme prejudice!<sup>2</sup> We are the feeders and consumers, and we'll stop at nothing to feast upon the apathy with which we protect our values, unless we are required to reevaluate our own concept of freedom. Law and order can ease that burden and teach how to support values as each of us reach for a future of prosperity. The description exemplifies what lessons may be learned from the order of law and rules designed to make our governmental system more stable and consistent. We all would like to function better and communicate our desires with greater impact for contribution and reward. Perhaps we should have legal studies as part of our curriculum in public education for every citizen, student, hiring manager, and corporate team in order to enhance consistency that enables our society to work with greater consistency, justice, and fairness.

### **Ageism Ratios**

This is not just a story of people in their 60s or 70s. Workers as young as 50 are shocked to find themselves suddenly tossed onto the employment rubbish heap, just when they felt on top of their game. They're feeling stressed, angry and betrayed by a society that has benefited greatly from their contributions. Bigotry That Knows No Boundaries: age discrimination may become a reality whether you are black or white, poor or well off, male or female, gay or straight. It is a reality that all will likely face if they live long enough. In the job market, a person's ability to survive and have a sense of self-worth

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<sup>2</sup> Cary Franklin, *Discriminatory Animus*, University of Michigan Law School, 2014, [https://www.google.com/search?ei=gIFsXLnZM4qAtQWS8qXQAQ&q=is+this+an+age+of+crippling+discriminatory+animus+with+extreme+prejudice%3F&oq=is+this+an+age+of+crippling+discriminatory+animus+with+extreme+prejudice%3F&gs\\_l=psy-ab.3...91553.141598..142178...0.0..0.195.8340.7j66.....0...1..gws-wiz.....0i71j0i131j0j0i67j0i22i10i30j0i22i30j33i160j33i299j33i22i29i30j33i10.zLxdmGlo9tU](https://www.google.com/search?ei=gIFsXLnZM4qAtQWS8qXQAQ&q=is+this+an+age+of+crippling+discriminatory+animus+with+extreme+prejudice%3F&oq=is+this+an+age+of+crippling+discriminatory+animus+with+extreme+prejudice%3F&gs_l=psy-ab.3...91553.141598..142178...0.0..0.195.8340.7j66.....0...1..gws-wiz.....0i71j0i131j0j0i67j0i22i10i30j0i22i30j33i160j33i299j33i22i29i30j33i10.zLxdmGlo9tU), (last visited Feb. 19, 2019.)

becomes questionable as they age. New research shows that age discrimination may be even more common than we thought and more prevalent than other forms of bias, like ethnic discrimination. According to a study published in the *Journal of Age and Ageing*, one third of British people in their 50s and above reported age discrimination, a figure that surprised researchers. From poorer service in restaurants to ill treatment in hospitals to outright harassment, people found themselves increasingly disrespected as they aged.<sup>3</sup>

Lead researcher Isla Rippon of University College London told Reuters that such day-to-day experiences impact physical and mental health, "Frequent perceived discrimination may be a chronic source of stress and build up over time, leading to social withdrawal and reluctance to go to the doctor."<sup>4</sup> When it comes to financial stress, older Americans say that job insecurity is their number-one concern, according to a recent survey.<sup>5</sup> Many people over 50 find themselves hanging on to their jobs for dear life, aware that they are perceived as obsolete and not as valuable as younger workers, despite their vast experience and institutional knowledge. According to a 2013 AARP survey report, "more than one-third of older workers are not confident that they would find another job right away without having to take a pay cut or move

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<sup>3</sup> Parramore, Lynn Stuart, *Economic Discrimination: An American Corporate Phenomenon*, "50 Is the New 65: Older Americans Are Getting Booted from Their Jobs and Denied New Opportunities", and "Age discrimination could be headed your way, sooner than you think.", Dec. 22, 2013, <https://www.alternet.org/economy/age-discrimination-workplace> ", (last visited on 10/14/2018.)

<sup>4</sup> L. Rippon, *The Ageing Experience: Perceived age discrimination and self-perceptions of ageing in the English Longitudinal Study of Ageing*, ULC Discovery, 2016, <http://discovery.ucl.ac.uk/1508174/>, (last visited Feb. 19, 2019).

<sup>5</sup> Maureen Connolly and Margot Slade, *The United States of Stress 2018*, Everyday Health, <https://www.everydayhealth.com/wellness/united-states-of-stress/>, (last visited Feb. 19, 2019.)

(37%). Of those, about one in five (19%) say the reason they are not confident is due to age discrimination and 21 percent identify age limitations, such as feeling they are 'too old' or limited in some way because of their age."<sup>6</sup>

Ashton Applewhite blogs about aging and ageism at ThisChairRocks.com.<sup>7</sup> In this blog, she discusses some of the myths concerning older workers that permeate our culture: that people over 50 are rigid, trapped in their jobs, take too many sick days, or can't cope with technology. The most common myth is that older workers are all the same. Applewhite's research shows that nothing could be further from the truth. The hallmark of later life is heterogeneity. Think about it. We become less alike with every day that passes. A group of 20-year-olds is much more alike than a group of 60-year-olds. People age at different rates. The stereotypes don't fit. Older workers go more slowly, but they're more accurate. Age confers patience and coping skills, the ability to handle stress. The perception that older workers can't handle physically demanding tasks is often outdated. Chronological age is generally not an indicator of capacity, even for pilots or firefighters. Older, experienced workers actually hurt themselves less on the job. The idea that after a certain age you can't do demanding tasks is just a myth. Even during slavery, the market price for slaves remained high well into their 70s, because slave owners knew they could do valuable work. The stereotype that older workers can't adjust to technology is similarly overstated, she says, noting that

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<sup>6</sup> Staying Ahead of the Curve 2013: The AARP Work and Career Study, Older Workers is an Uneasy Job Market, published in 2014, [https://www.aarp.org/content/dam/aarp/research/surveys\\_statistics/general/2014/Staying-Ahead-of-the-Curve-2013-The-Work-and-Career-Study-AARP-res-gen.pdf](https://www.aarp.org/content/dam/aarp/research/surveys_statistics/general/2014/Staying-Ahead-of-the-Curve-2013-The-Work-and-Career-Study-AARP-res-gen.pdf), (last visited Feb. 19, 2019).

<sup>7</sup> Ashton Applewhite, *This Chair Rocks*, Feb. 14, 2019, <https://thischairrocks.com/blog/>, (last visited Feb. 17, 2019).

they are usually more than capable of learning new technical skills, particularly if those skills have relevance to their work experience. Applewhite's research shows that the most productive and effective teams in the workplace are mixed-age groups. "Experience plus freshness just makes sense," she says. "A team with different generational perspectives has new energy, new possibilities for collaboration."<sup>8</sup>

We live in an era of planned obsolescence, in which designers deliberately make a thing limited in its useful life. Now this planned obsolescence includes human beings. Is it really an efficient use of our human capital to turn experienced workers into Walmart greeters? Clearly, we need workplace policies and programs that expand the opportunities for older Americans to extend their labor force participation and continue to contribute their valuable skills and experience. Phased retirement plans in which older workers are kept on as part-time workers or consultants, for example, can benefit both employers and employees. Such plans mitigate the potential loss of knowledge as older workers retire. The biggest-picture problem in the economy that needs to be addressed has to do with what economists call aggregate demand, the overall demand for goods and services. When people don't have enough money in their pockets, which happens when economic shocks occur, and the government pursues austerity policies, businesses stop hiring and people can't find jobs or keep the ones they have. This results in involuntary unemployment. Unless the government invests in the economy through jobs programs, education, infrastructure-building, and so on, aggregate demand remains low and unemployment persists. Telling people to accept lower paying jobs may make sense for individuals, but in the economy as a whole, as Keynesian economists constantly remind us, wage cuts just add to the

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<sup>8</sup> Id.

shortfall in demand.<sup>9</sup> In the end, we want an economy that allows everyone to work who is able to do so and provides a robust social safety net for those who can't. According to Parramore, "Our current system is unsustainable, and age discrimination, which strikes even those who are still in their prime, is quickly becoming an economic, social and public health disaster for the 21st century."<sup>10</sup>

### Discrimination Trends

Consider the story of IBM as told by Peter Gosselin and Ariana Tobin in ProPublica.<sup>11</sup> Apparently IBM enabled a planning presentation that former IBM executives said was drafted by heads of a business unit carved out of IBM's once-giant software group and charged with pursuing the "C," or cloud, portion of the company's CAMS strategy. The presentation laid out plans for substantially altering the unit's workforce. It was shown to company leaders including Diane Gherson, the senior vice president for human resources, and James Kavanaugh, recently elevated to chief financial officer. Its language was couched in the argot of "resources," IBM's term for employees, and "EP's," its shorthand for early professionals or recent college graduates. Among the goals: "Shift headcount mix towards greater % of Early Professional

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<sup>9</sup> Will Kenton, *Keynesian Economics*, Investopedia, <http://www.investopedia.com/terms/k/keynesianeconomicsasp>, (last visited Feb. 17, 2019).

<sup>10</sup> Lynn Parramore, *50 is the New 65: Older Americans are Getting Booted from Their Jobs and Denied New Opportunities*, AlterNet, Dec. 24, 2013, <https://www.alternet.org/2013/12/age-discrimination-workplace/>, (last visited Feb. 19, 2019).

<sup>11</sup> Peter Gosselin and ArianaTobin, , *Cutting 'Old Heads' at IBM*, March 22, 2018, <https://features.propublica.org/ibm/ibm-age-discrimination-american-workers/>, (last visited on 10/14/2018.)

hires.” Among the means: “[D]rive a more aggressive performance management approach to enable us to hire and replace where needed and fund an influx of EPs to correct seniority mix.” Among the expected results: “[A] significant reduction in our workforce of 2,500 resources.” A slide from a similar presentation prepared last spring for the same leaders called for “re-profiling current talent” to “create room for new talent.” Presentations for 2015 and 2016 for the 50,000-employee software group also included plans for “aggressive performance management” and emphasized the need to “maintain steady attrition to offset hiring.”<sup>12</sup>

### **Leading by Example**

The example above sets the tone for an environment prevalent with discrimination, justified only as a means to support new competitive growth in corporate economic models. Nothing to substantiate our constitutional rights, Supreme Court decisions, or a legislative process to protect and promote the health and welfare of our all working-class citizens tasked with responsibilities that secured our freedom, grew our companies and enhanced our GDP for 50+ years and more. Furthermore, to manipulate laws and leverage legal strategy to benefit entities that would support a continuation of growth to destroy competition, is not only irresponsible economically, but at the very least, the highest form of immoral perpetuity and corruption of a system originally geared for balance and fairness by founders and intended to employ equal opportunity in the nation. Taking a closer look at the letter of the laws that govern these issues, we see a disconnect in the interpretation by companies such as IBM and other major conglomerates that enables them to violate the public policy purpose behind the law. It’s time for comprehensive reform throughout the

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<sup>12</sup> Id.

courts in the business law areas regarding age discrimination!

### **The Problem: Discrimination**

We have a problem America; Discrimination! This bias against older employees has infiltrated every aspect of our societal boundaries from judicial benchmarks to corporate oversight, regulatory policy and the rule(s) of Capitalism. The insight into why there may be a pre-conceived bias against older employees may come from the rapidly developing technology sector. One of the phrases used to indicate intentional bias is the "Right Fit." It is a polite term used today to say, "we discriminate here, thank you for your service and understanding, best of luck". Additionally, the target market of potentially "right fit" employees sought for any job, brand development or luxury promotion in a 2019 business model, may also be considered a comparison problem to the impending wave of millennial consumers entering the labor market. Thus, a condition of "subliminal discrimination" occurs in corporate structures when they seek to match the labor pool their profiles. To quantify the finding, one only has to look at the hiring strategies of human resource departments harvesting new graduates from the higher education platform across the country to match the "early professionals" seeking business and leisure services positions. As aging Veterans in our population struggle to hold positions or gain entry into the labor pool, they are finding the task cumbersome and demeaning.

### **Corporate Education**

Discrimination has become an institutional lifestyle. Engrained in corporate governance, supported in the institution of education, and practiced in the economic debate of how and why we promote ourselves

in America as the “New Fresh Face” of consumer markets on the global scale, we set the stage and expectations for engaging in age discrimination. We keep telling ourselves we want everything new, and we reinforce the principle in how to approach our own consumerism, and that of a potential world market share. It is corporate design by default, and it has infiltrated every aspect of our approach to building a future of equality and fairness. Thinking about mission statements and the core competencies in the sustainable development messaging utilized to promote brands, companies, organizations, institutions, policies, charities and more, we begin to understand the power of subliminal messaging. Business will leverage any asset, or resource to corner, and dominate market share, consumer populations, votes, tax incentives, social utility, labor pools, hiring strategies, educational planning, career development, internship opportunities, workforce alliance programs, strategic economic development, corporate infrastructures, and the list goes on quite a bit further, like down the cartesian line into discrimination infinity. Some are well practiced at harvesting “top tier human capital” opportunity. It’s the American way. It is supported by the institutionalists, the non-pragmatists, and every political body we can conceive. While corporate giants lobby and leverage market suppliers, the “academics” operating our politics, offer a persuasive educational theory that makes the case for age discrimination as the foundational theory for maximizing assets. They help structure the interpretation of market demand and the interpretation of the laws and rules regulating human behavior. The rule of law is defined as, “the principle that all people and institutions are subject to and accountable to law that is fairly applied and enforced; the principle of government by law.”<sup>13</sup> The concept of the rule of law is central to our system of governance. Our system is supposed to be about fairness, and

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<sup>13</sup> Dictionary.com, <https://www.dictionary.com/browse/rule-of-law>, (last visited Feb. 19, 2019).

building dreams in this country, and guidelines that provide corrective measures we all seek on our journey. Course correction is a necessary component of matching pace with the evolving social mores. We rely upon ethics, constitutional principles, and social values to form the framework of our important systems.

### **Statutory Guidelines: The Supreme Order**

From the Code of Federal Regulations, 29 CFR 1614.101,<sup>14</sup> we have the following information concerning the general policy concerning the task of the Equal Employment Opportunity Commission, § 1614.101 and its work to prevent discrimination:

(a) It is the policy of the Government of the United States to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, age, disability, or genetic information and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.<sup>15</sup>

(b) No person shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act (title VII) ( 42 U.S.C. 2000eet seq.), the Age Discrimination in Employment Act (ADEA) ( 29 U.S.C. 621et seq.), the Equal Pay Act ( 29 U.S.C. 206(d)), the Rehabilitation Act ( 29 U.S.C. 791et seq.), or the Genetic Information Nondiscrimination Act

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<sup>14</sup> Code of Federal Regulation, Chapter XIV, Equal Employment Opportunity Commission, <https://www.law.cornell.edu/cfr/text/29/1614.101>, (last visited Feb. 19, 2019).

<sup>15</sup> Id.

(GINA) ( 42 U.S.C. 2000ffet seq.) or for participating in any stage of administrative or judicial proceedings under those statutes. 74 FR 63984, Dec. 7, 2009.<sup>16</sup>

Congressional concerns and the statement of the purpose behind the anti-discrimination laws are reflected in 29 U.S. Code § 621:

- (a)The Congress hereby finds and declares that— (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs; (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons; (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave; (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce. (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment. (Pub. L. 90–202, § 2, Dec. 15, 1967, 81 Stat. 602.)<sup>17</sup>

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<sup>16</sup> Id.

<sup>17</sup> 29 U.S. Code § 621 , Chapter 14, Age Discrimination in Employment, <https://www.law.cornell.edu/uscode/text/29/621>, (last visited Feb. 19, 2019).

### **Civility is an Attitude**

Corporate America's insistence that profit is the only value to be sought is destroying the very foundation of our economic systems. Are we civilized? That's a fair question? The story is not yet written because oppression persists from the ever more pervasive ruling class. Their manipulation of our legal and business systems so that they have a society of obedient slaves working and building a lifestyle for the ruling class is reprehensible. We strive for greatness, they settle for capital gains! The vast majority of Americans grovel at the steps of capital enterprise, begging for entrance. Corporate America gorges themselves on profits as they violate statues and regulations in order to gain the advantage. The rule of law is no match for our present greed and only a flicker of light in the endless darkness in man. We need a better message, one that communicates values concerning families, community, organization, regions, states and our country on an ever emerging and evolving global sustainability platform. We need a change in mindset related to how one acquires wealth through a function of contribution. A mechanism that allocates resources related to contributions in relation to the contribution of others should be used to propel the innovations for growth solutions. The general welfare of people living, working and playing well together, comes through the accumulation of resources and the knowledge that we share in partnerships concerning labor and service.

### **Summation: An Impetus for Change**

Research tells us we have much to learn, about ourselves and perspectives in the world. Values have shifted, and priorities have changed us all. We are moving into unknown territory. At issue is the question of our own validity and an aggressive impulse to contribute.

We also seem to be very compelled to conform to the majority's expectations. So, contribution seems to be something everyone needs. It's a compulsion about expression of values and influences and a quest for acceptance as a contributor. Enabling acceptance is another important skill for Americans to acquire and is significantly affected by age discrimination. Concepts like ethics and civility, order and rules about fairness and equality for consideration and contribution, all have a place at the table where we negotiate our sense of value and self-worth. That kind of negotiation and collaboration is not as possible when the guiding principles are reflected by theories related to survival of the fittest, eat or be eaten, work or die. The answer probably lies in education with an emphasis on an understanding of fairness and justice and the required components for our system to find bala