

TESTIMONY BEFORE THE HOUSE SUBCOMMITTEE ON
ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW:
Justice Denied: Forced Arbitration and the Erosion of our
Legal System
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Chairman Cicilline, Ranking Member Sensenbrenner, and other distinguished members of the House Subcommittee on Antitrust, Commercial and Administrative Law, thank you for providing me with the opportunity to testify about my experience with forced arbitration.

On July 6, 2016, my story about sexual harassment and Fox News Chairman and CEO Roger Ailes became public. And it ran like wild fire on twitter feeds and breaking news alerts all around the world. Back then, I could have never known I would become one of the prominent faces fighting against forced arbitration, or that in the 2 1/2 years since my case, a tidal wave of women would have joined me in courageously speaking out against workplace harassment. But here's what I've found out: Courage is contagious...and the cultural revolution we're experiencing right now ... is long overdue.

The first step for me was telling the truth. The next step ... was to work to change the system ... for *all* women and men across our country. So I spent much of 2017, 18 and now 2019 walking the halls of Congress, encouraging legislators to take real, meaningful action to help workplace harassment victims. In December 2017, I proudly joined legislators from both parties—Congresswomen Bustos and Stefanik – and Senators Gillibrand and Graham—to introduce in both chambers the “Ending Forced Arbitration of Sexual Harassment Act”. And on February 28th of this year, with a new Congress, the bill was reintroduced in the House – House Bill 1443 -- a bill to restore workplace harassment victims’ Constitutional 7th Amendment right to a jury trial instead of the secrecy of forced arbitration.

So why is this bill so important to me?

Because this isn't about me. This is about the thousands of women across this country who reached out to me after my story became public – making me realize that almost every woman in our country has a story and that's shameful. Over the past 2 ½ years, these women have shared their emotional stories of pain and humiliation -- but mostly about how they've all been silenced – because that's what forced arbitration helps to do. Turns out – that silencing is the harasser's best friend.

Sadly, my story is not unique. Sexual harassment of women and men in the workforce isn't a new problem, and unfortunately neither is the use of forced arbitration to cover up systemic sexual harassment. For years, Dov Charney, the founder and former CEO of American Apparel sexually harassed and assaulted employees of the company. These were young women, teenagers – some as young as 17 years old.¹ But it wasn't until 2014 that Mr. Charney was held accountable for his actions and he was fired by the company's board. The sexual misconduct was able to be hidden for years because the company required all employees to sign employment agreements that included a forced arbitration clause.² The purpose of which was clear: to keep any disputes secret and away from public scrutiny. Had the company not used forced arbitration, they would have faced public accountability and been forced to act years sooner and many of his victims would have been spared.

Another horrifying example is the more than 180 women who have reported being sexually assaulted by massage therapists at Massage Envy spas.³ These women put their trust into a company and its employees, only to suffer the trauma of being sexually assaulted and then continue to suffer as the company did little to help them and

¹ Katie Baker, *Dov Charney 'Sex Slave' Lawsuit Will Settle Out of Court*, Jezebel, March 22, 2012: <https://jezebel.com/5895487/dov-charney-sex-slave-lawsuit-will-settle-out-of-court>

² Steven Davidoff Solomon, *Arbitration Clauses Let American Apparel Hide Misconduct*, July 15, 2014: <https://dealbook.nytimes.com/2014/07/15/arbitration-clauses-let-american-apparel-hide-misconduct/>

³ Katie Baker, *More Than 180 Women Have Reported Sexual Assaults at Massage Envy*, BuzzFeed News, November 26, 2017: <https://www.buzzfeednews.com/article/katieimbaker/more-than-180-women-have-reported-sexual-assaults-at>

instead tried to silence them. Now that these women are seeking public accountability in court, the company is trying to force them into arbitration, because hidden in the fine print of the terms and conditions of the company's app and iPads (used to check in for services) was a forced arbitration clause.⁴ Take the case of Lilly Silbert from California, who I recently met and whose story I listened to. Lilly says that she was sexually assaulted by her Massage Envy therapist, but because she used the company's app to try and cancel her membership *after* she was sexually assaulted, the company is trying to force her, and many women like her, into arbitration.

Recently, The New York Times covered the story of thousands of women who were employed by Sterling Jewelers who suffered widespread sexual harassment and pay discrimination for years.⁵ The article describes the conduct the women were subjected to – groping, sexual coercion, sexual degradation and even rape. For years, the conduct was covered up, with the women being forced into arbitration. As the article describes “[t]he benefit to the company was that it was resolved in secret. The secrecy was the point.”⁶ In 2008, many of the women decided to come forward and seek legal action against the company, filing a class action lawsuit which at one point was comprised of 69,000 women.⁷ However, because Sterling Jewelers required their employees to sign arbitration agreements the company has been trying to dismiss the lawsuit and force all of the women into private, secretive arbitration, on an individual basis – creating a wall of silence even between the women.⁸ This prevents women from having important evidence about a pattern of behavior, and from supporting one another in stressful litigation against a large corporation.

⁴ Brooks Jarosz, *Fears loom that sexual assault cases involving Massage Envy will remain private*, FOX KTVU, December 21, 2018, <http://www.ktvu.com/news/fears-loom-sexual-assault-cases-involving-massage-envy-will-remain-private>.

⁵ Taffy Brodesser-Akner, *The Company That Sells Love to America Had a Dark Secret*, New York Times Magazine, April 23, 2019: <https://www.nytimes.com/2019/04/23/magazine/kay-jewelry-sexual-harassment.html>

⁶ Taffy Brodesser-Akner, *The Company That Sells Love to America Had a Dark Secret*, New York Times Magazine, April 23, 2019: <https://www.nytimes.com/2019/04/23/magazine/kay-jewelry-sexual-harassment.html>

⁷ Drew Harwell, *Hundreds allege sex harassment, discrimination at Kay and Jared jewelry company*, Washington Post, February 27, 2017: http://wapo.st/2mEkm1F?tid=ss_mail&utm_term=.03d00fdedcd3

⁸ Nick Brown, *Sterling Motion to Disallow Class Action Rejected*, Law360, January 5, 2010: <https://www.law360.com/articles/141374/sterling-motion-to-disallow-class-action-rejected>

In all these cases, because of the secrecy that surrounds forced arbitration, it is impossible to know exactly how many women were sexually assaulted or harassed and came forward. What we also don't know is how many women chose not to come forward, but to stay quiet, or quit, because they knew that they would be forced into arbitration where their voices would be silenced.

My going public shed a light on the scourge of more of this pervasive epidemic – the Weinstein allegations, the Bill Cosby allegations, the Bill O'Reilly allegations, the Les Moonves allegations, the Matt Lauer allegations, the Charlie Rose allegations, the Mark Halperin allegations ... and more.

From the victim's point of view ... here's what happens when a woman being harassed on the job finally decides to come forward. She goes to HR to complain and if she has an arbitration clause -- and she probably does since 60 million Americans do – the HR reps probably says – phew! “No one will ever know about this!” Her case is promptly thrown into the “secret chamber”. More than likely she'll be blacklisted, demoted or fired from her job. She may get a paltry settlement, but in arbitration she'll find out there are no appeals, limits on discovery – which is evidence gathering – and on witnesses. And arbitrators come back for repeat business where they've been before. Individual employees do not provide repeat business for arbitrators – but a large corporation – like Sterling Jewelers with thousands of complaints – can keep an arbitrator paid for years. Our woman will probably never work again, and notably, no one else at her place of employment will know that harassment may be an issue, and worst of all, her perpetrator will likely get to stay on the job – because the whole process has been a secret – free to harass again and again.

None of us expect to start a new job and get into any kind of dispute. I know I didn't. So many Americans sign forced arbitration agreements without even knowing what they are or thinking about what they mean

for their Constitutional rights. And the employer can refuse to hire people who won't sign. What kind of "agreement" is that?

But to be silenced after simply having the guts to come forward? That's unjust and un-American.

But now we're seeing the effects of people saying enough is enough. We're seeing that the voices of women and men are being heard! And companies are taking notice!

After we first introduced our bill in 2017, Microsoft decided to be bold and take forced arbitration clauses out of their employment contracts. Then Uber and Lyft. Then after the Google walk out, Google, Ebay, Airbnb, Facebook, and Vox Media.

Turns out --- It's not just courage that's contagious -- **Action** is too. And the voices of workers across this country matter – and they *are* being heard.

I want to thank the brave members of Congress from both sides for already drawing a line in the sand. Thank you for doing what's right for women.

But now its time for all members of Congress to show the same kind of courage. It's my hope members from **both sides of the aisle** will stand up and speak up in support of this bill.

Because sexual harassment is not a partisan issue. It knows no political or socio-economic boundaries. It's our police officers, firefighters, teachers, lawyers, doctors, bankers, Congressional workers, and journalists. And the consequences show no bounds. We've seen titans from both sides fall.

And that's why we should all care.

In this cultural revolution, it's time to get something *real* done for women. And it's my great hope that we will get it done in a bi-partisan way – for women, for men, for our children and our country.

Thank you.

Gretchen Carlson
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