

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:15-cv-01974-WJM-KLM

DAVID MUELLER

Plaintiff

v.

TAYLOR SWIFT;  
FRANK BELL;  
ANDREA SWIFT a/k/a ANDREA FINLAY; and  
JOHN DOES 1 - 5

Defendants

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**PLAINTIFF’S MOTION TO EXCLUDE TESTIMONY  
OF LORRAINE BAYARD DE VOLO**

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Plaintiff David Mueller, through his counsel, M. Gabriel McFarland of Evans & McFarland, LLC, respectfully submits Plaintiff’s Motion to Exclude Testimony of Lorraine Bayard de Volo. As grounds therefor, Plaintiff states as follows:

**I. CERTIFICATION**

The undersigned counsel hereby certifies, pursuant to D.C.Colo.LCivR. 7.1 (A), that he has conferred with Doug Baldridge, counsel for Defendants, regarding the relief requested in this Motion. Mr. Baldridge has indicated that Defendants will oppose the requested relief.

**II. INTRODUCTION**

Ms. Swift contends that during a June 2, 2013 meet-and-greet at the Pepsi Center, Mr. Mueller “put his hand under [her] dress and grabbed [her] bare ass.” Mr. Mueller’s employer, KYGO, later terminated Mr. Mueller because Ms. Swift and her

team relayed the same to him. This suit followed. Mr. Mueller asserts five claims for relief: (1) Intentional Interference with Contractual Obligations; (2) Tortious Interference with Prospective Business Relations; (3) Slander *per se*; (4) Slander *per quod*; and (5) *Respondeat Superior*. Ms. Swift has asserted a counterclaim for assault.

Defendants designated Lorraine Bayard de Volo, who has a PhD in political science and is a professor of women and gender studies, as an expert witness. She has never before served as an expert witness, and apparently has no training in psychology. Nonetheless, according to Ms. Bayard de Volo's written report,<sup>1</sup> she intends to opine that Mr. Mueller had the profile of a person likely to sexually assault women:

Sexual harassment and assault are fundamentally motivated by the perpetrator's perceived need to assert power and to protect the perpetrator's status. Throughout David Mueller's pleadings in this lawsuit and his deposition testimony, he indicated that even before he met Ms. Swift, he felt his job security was threatened, his identity as a radio personality was threatened, and his masculinity was threatened. This perfect storm of threats to Mr. Mueller's perceived status is consistent with the well-settled, academically-accepted, perceived threats to status that motivate a man to commit sexual harassment or assault.

Report at 1-2. Those opinions are not based on sufficient facts or data, are not otherwise credible or reliable, and are not admissible. Moreover, any relevance of the proposed testimony is outweighed by the danger of unfair prejudice.

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<sup>1</sup> A copy of Ms. Bayard de Volo's report is attached as Exhibit 1.

### III. LEGAL STANDARD

A district court must act as a “gatekeeper” in admitting or excluding expert testimony. *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1232 (10th Cir. 2004).

Admission of expert testimony is governed by Fed. R. Evid. 702, which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Ultimately, the Court must determine whether the expert’s opinion would assist the trier of fact in understanding or determining a fact at issue in the case. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 592 (1993). The Court must also weigh the relevance of any proposed expert testimony against “the danger of unfair prejudice, confusion of the issues, waste of time, or needless presentation of cumulative evidence.” Fed. R. Evid. 403. The proponent of the expert testimony bears the burden of proving the foundational requirements of Rule 702 by a preponderance of the evidence. *United States v. Nacchio*, 555 F.3d 1234, 1241 (10th Cir. 2009).

### IV. DISCUSSION

Even though Ms. Bayard de Volo has no training in psychology, has never met or spoken to Mr. Mueller, and has no idea of Mr. Mueller’s upbringing or ideals, she contends that Mr. Mueller has the profile of a person likely to commit sexually assault:

- “Sexual harassment and assault are fundamentally motivated by the perpetrator’s perceived need to assert power and to protect the perpetrator’s status. Throughout David Mueller’s pleadings in this lawsuit and his deposition testimony, he indicated that even before he

met Ms. Swift, he felt his job security was threatened, his identity as a radio personality was threatened, and his masculinity was threatened. This perfect storm of threats to Mr. Mueller's perceived status is consistent with the well-settled, academically-accepted, perceived threats to status that motivate a man to commit sexual harassment or assault."<sup>2</sup>

- "Mr. Mueller's pleadings and deposition testimony show that on the evening of June 2, 2013, Mr. Mueller faced an accumulation of perceived threats to his status consistent with the threats to status that, according to well-accepted academic research and studies, motivates sexual harassment and sexual assault."<sup>3</sup>
- "Threats to status revolved around his job and identity as a radio personality, both of which were also closely tied to his sense of masculinity."<sup>4</sup>
- "In my opinion, his stated perception of events and his view of his own status is [sic] consistent with the circumstances under which sexual aggressors would commit unwanted sexual contact, such as grabbing a woman's bottom."<sup>5</sup>
- "His testimony and pleadings also indicate his belief that unwanted sexual contact is something that men in radio can get away with even if other men cannot for one or a combination of reasons, including the

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<sup>2</sup> Report at 1-2.

<sup>3</sup> Report at 3.

<sup>4</sup> *Id.*

<sup>5</sup> Report at 8.

following: because Swift's staff would be more likely to believe a man who is in radio because he thought KYGO would defend him against Ms. Swift's accusation; or because such groping, if done by a man in radio, could be excused as a joke, a misunderstanding, part of the business, or his prerogative as a radio host who regularly met with famous women."<sup>6</sup>

This is exactly the type of profile evidence that is inadmissible. "A profile is a collection of conduct and characteristics commonly displayed by those who commit a certain crime." *People v. Robbie*, 112 Cal. Rptr. 2d 479 (Cal. Ct. App. 2001) (opinion that defendant had the characteristics of a child molester was inadmissible). "Profile" evidence is that which attempts to link the general characteristics of, *e.g.*, serial murderers to specific characteristics of a defendant. *See People v. Prince*, 40 Cal.4th 1179, 1226 (2007). Perhaps the most frequently cited example is the drug courier profile, which the United States Supreme Court has defined as "a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics." *E.g., Reid v. Georgia* 448 U.S. 438, 440 (1980). Such profile evidence is not admissible as probative of whether or not the profiled individual committed any specific act. *See Salcedo v. People*, 999 P.2d 833, 840 (Colo. 2000) ("In sum, [the expert witness's] drug courier profile was not helpful to the jury because it was inherently subjective, of dubious reliability, and logically irrelevant, and because its probative value was substantially outweighed by a risk of misleading the jury.").

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<sup>6</sup> *Id.*

The admission of the type of profiling testimony proffered by Ms. Bayaud de Volo runs contrary to fundamental American values of fairness and fundamental legal tenets of burdens of proof. If her report addressed such extreme generalizations about race, as opposed to gender, Defendants would have been embarrassed to submit it. Ms. Bayaud de Volo's profiling of men is no less offensive, and certainly no more helpful to the jury, than classic racial or ethnic profiling. *See People v. Martinez*, 10 Cal. App. 4th 1001, 1006, 12 Cal. Rptr. 2d 838 (1992) ("While the similarities may be a proper consideration for law enforcement in investigating criminal activity, they are inappropriate for consideration on the issue of guilt or innocence for the very reason given in the drug courier profile cases: the potential of including innocent people as well as the guilty."); *People v. Castaneda*, 55 Cal. App. 4th 1067, 64 Cal. Rptr. 2d 395 (1997) ("Every defendant has the right to be tried based on evidence tying him or her to the specific crime charged, and not on general facts accumulated by law enforcement regarding a particular criminal profile.").

#### IV. CONCLUSION

Ms. Bayard de Volo's opinion that men who are worried about their jobs or receive threats to their masculinity are likely to commit sexual harassment or assault will not assist the trier of fact. There are millions of men who worry about their jobs or receive threats to their masculinity every day and who never sexually harass or assault women. In other words, with the group described by Ms. Bayard de Volo, there are at least as many men who have not or would not inappropriately touch a woman. Moreover, any potential relevance, however slight that may be, is most certainly outweighed by the danger of unfair prejudice. Defendants cannot reasonably ask the jury to adjudge

Mr. Mueller “guilty” of sexual assault based on the profile of some men who have had—very generally and vaguely—similar life experiences, rather than on the evidence of what actually occurred between Mr. Mueller and Ms. Swift on June 2, 2013.

WHEREFORE, Plaintiff respectfully requests that the Court grant Plaintiff’s Motion to Exclude Testimony of Lorraine Bayard de Volo.

Dated this 12th day of May, 2017.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

**CERTIFICATE OF SERVICE**

I hereby certify that on May 12, 2017, *Plaintiff’s Motion to Exclude Testimony of Lorraine Bayard de Volo* was filed with the Clerk of Court using the CM/ECF system and the same served via email upon at least the following:

J. Douglas Baldridge (jbaldridge@venable.com)  
Courtney A. Sullivan (casullivan@venable.com)  
Katherine M. Wright (kmwright@venable.com)

s/M. Gabriel McFarland  
M. Gabriel McFarland