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HEADLINE: Fired Male Ob.Gyn.Claims Gender Bias.

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BODY:

Dr. David Garfinkel, a Morristown, N.J., ob.gyn., is still hoping for his day in court to tell a judge about how he believes he was wrongfully fired from an ob.gyn. practice solely because he is a man.

Dr. Garfinkel is one of many male ob.gyns. who in recent years have complained that they have been rejected from or not considered for jobs because those who run ob.gyn. practices believe that most of their patients prefer a woman doctor. But health care **lawyers** say lawsuits on the matter are few and far between, and to date, no ob.gyn. has won such a case.

If Dr. Garfinkel's discrimination case does go to court and he wins, it could lead to an increase in the number of similar cases being brought to trial, said Anthony DiLeo, a health care **lawyer** who also teaches health care law at Tulane University, New Orleans.

A well-publicized victory could inspire other **lawyers** with similar cases to cite the initial case as a precedent. Yet Mr. DiLeo and others described this path as lengthy and difficult.

Discrimination cases tend to be very "factually intensive," based on a lot of very specific details. "When you have a factually intensive case, it's hard to find two cases that are just alike, and that limits the precedent-setting value of the case," said Mr. DiLeo.

Dr. Garfinkel was terminated from Morristown Obstetrics & Gynecology Associates in 1998. Calls to the practice and its **attorney** for comment on this article were not returned.

According to published reports, the practice said it terminated Dr. Garfinkel because he was not bringing in enough business. But Dr. Garfinkel told

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this newspaper he was doing plenty of business, at least in obstetrics; he cited as evidence the records at the hospital where he and six other doctors in the practice had privileges.

"Of the seven doctors there, I was doing the most deliveries. They can say all they want about my gynecology practice, but it takes time to build a practice." He added that the group never shared any information with him about his productivity and that during a discussion about his termination, one of the partners in the practice--who was also male--said to him, "You were born the wrong sex." The practice has since hired several female physicians, according to Dr. Garfinkel.

He wanted to sue the practice for sex discrimination. However, his employment contract with the practice contained a clause saying that any contract disputes must be taken to arbitration rather than into court. So instead of suing for discrimination, he sued to get out of the arbitration clause. He lost the first two times, and the case is now on appeal to the New Jersey Supreme Court.

If Dr. Garfinkel, who has since opened his own practice in Morristown, does manage to get out of the arbitration clause and sue for sex discrimination, he'll have a tough row to hoe, **lawyers** say.

In employment discrimination cases, the burden of proof often shifts back and forth from the employee to the employer, said John Lyncheski, a Pittsburgh **lawyer** who is also vice chair of the Labor, OSHA, and Human Resources Committee of the American Health **Lawyers** Association.

"First, [Dr. Garfinkel] has to prove that his sex was a factor in their employment decision; that could be as simple as saying that he's a male and he was replaced by a female," Mr. Lyncheski said. "Then the burden shifts to the employer ... to show that 'No, that wasn't the reason; there was a business reason for the termination.' Then the burden shifts back to the doctor to provide direct evidence of sex discrimination or to show that the idea of a business reason is false."

A business cannot legally discriminate based on an applicant's gender unless it is a "bona fide occupational qualification," or BFOQ--a necessary requirement for the job, he continued. "For example, if a producer is casting someone to play the role of Hamlet, he can say, 'I want a man,' " Mr. DiLeo said.

But can a woman's preference for a female doctor be considered a BFOQ? "I think case law would say that it's not," said **Andrew Dwyer**, a Newark, N.J., **lawyer** who is representing Dr. Garfinkel. "If customer preference were a BFOQ, then we would have restaurants that refuse to hire black waiters because their customers prefer white ones."

Although ob.gyn. practices cannot specify that they want to hire only female doctors, they can require physicians to meet productivity standards, which might be difficult for male physicians in an era when many women prefer to see a female ob.gyn.

If Dr. Garfinkel had been a partner in the practice rather than an employee, he would not have had any legal ground to stand on; only employees

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are protected from discrimination, said Mr. DiLeo.

Case law on the subject of discrimination against male physicians in ob.gyn. practices is relatively thin. One recent case is that of Dr. Mircea Veleanu, a 60-year-old New York ob.gyn. who was hired in November 1996 by Beth Israel Medical Center's satellite clinic in Westchester. He was fired a year later. Dr. Veleanu claimed that Beth Israel had discriminated against him based on age and gender, while Beth Israel alleged that Dr. Veleanu was the subject of numerous patient complaints and that the hospital needed to reduce the practice's costs.

The U.S. District Court for the Southern District of New York ruled against Dr. Veleanu, concluding that he had failed to prove either age or gender discrimination.

In his decision, U.S. District Judge Victor Marrero noted that Dr. Veleanu alleged that Beth Israel terminated him because it wanted to develop freestanding women's health centers that employed female ob.gyns. "That a medical entity may seek to respond to some medical treatment requests of its female patients ... does not, in and of itself, indicate that it discriminates against male doctors," Judge Marrero wrote. "Female patients may have a legitimate privacy interest in seeking to have female doctors perform their gynecological examinations."

Dr. Garfinkel agrees on the last point. "I'm not trying to convince women to see a male doctor, but it's going to be very sad when only women go into this field," he said.

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