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Article 13

GML § 50-e: Civil Rights Action Is Barred by Plaintiff's Failure to File a Notice of Claim Within 90 Days of Accrual of Claim

Kevin M. Berry

GENERAL MUNICIPAL LAW

GML § 50-e: Civil rights action is barred by plaintiff's failure to file a notice of claim within 90 days of accrual of claim

Section 50-e of the New York General Municipal Law[103] requires the filing of a notice of claim[104] in any tort action brought

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[103] GML § 50-e (McKinney 1977 & Supp. 1983). Section 50-e(1)(a) provides:

> In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate.

Id. § 50-e(1)(a). Section 50-e, which was enacted by the New York Legislature in 1945, originally provided for a 60-day period within which notice of claim had to be filed. Ch. 694, § 1, [1945] N.Y. Laws 1486. In 1950, section 50-e was amended to extend the filing period to 90 days. Ch. 481, § 1, [1950] N.Y. Laws 1222.

The requirement of notice was developed in order to protect municipalities from fraudulent and stale claims. *See Recommended Improvements and Unification of Requirements of Notices of Claim Against Municipal Corporations*, TENTH ANN. REP. N.Y. JUD. COUNCIL 265 (1944). The relatively short time period was intended to afford municipalities sufficient opportunity for the prompt investigation and preservation of the facts and circumstances surrounding a given claim. *See, e.g.*, Teresta v. City of New York, 304 N.Y. 440, 443, 108 N.E.2d 397, 398 (1952); Ziecker v. Town of Orchard Park, 70 App. Div. 2d 422, 427, 421 N.Y.S.2d 447, 450 (4th Dep't 1979), *aff'd mem.*, 51 N.Y.2d 957, 416 N.E.2d 1055, 435 N.Y.S.2d 720 (1980); Leone v. City of Utica, 66 App. Div. 2d 463, 468, 414 N.Y.S.2d 412, 416 (4th Dep't 1979), *aff'd*, 49 N.Y.2d 811, 403 N.E.2d 964, 426 N.Y.S.2d 980 (1980).

Section 50-e does not merely provide for a statute of limitation or repose, it establishes a condition precedent to the commencement of a lawsuit against a municipality. Gregory v. City of New York, 346 F. Supp. 140, 145 (S.D.N.Y. 1972). One crucial distinction between a time limitation that constitutes a condition precedent and a statute of limitations is that compliance with the terms of the former must be alleged in the complaint and proved by the plaintiff, while the expiration of the latter must be raised by the defendant as an affirmative defense. Graziano, *Recommendations Relating to Section 50-e of the General Municipal Law and Related Statutes*, TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE 358, 373-74 (1976) [hereinafter cited as Graziano, *Recommendations*]; *see, e.g.*, Doran v. Town of Cheektowaga, 54 App. Div. 2d 178, 182, 388 N.Y.S.2d 385, 387 (4th Dep't 1976) (complaint held defective due to plaintiff's failure to allege service of notice of claim within 90 days of claim's accrual). In addition, though a statute of limitations may be extended or tolled, a condition precedent is not subject to such modification, absent a specific statutory provision to the contrary. Graziano, *Recommendations*, *supra*, at 374.

[104] "Notice of claim" refers to the requirement that a potential defendant be informed of the existence of a claim pending against it within a certain period after the claim arises. SIEGEL § 32, at 31. The notice must be in writing and contain the name and address of the claimant, the nature of the claim, the time, place, and manner in which the claim arose, and the items of damage or injury alleged to have been sustained. GML § 50-e(2) (McKinney Supp. 1983-1984). The notice of claim, however, should not state the amount of damages to which the plaintiff deems himself entitled. *Id.*

against a public corporation.[105] This notice must be filed with the court and served on the defendant within 90 days after the claim arises.[106] The notice requirements of section 50-e have been extended by section 52 of the New York County Law to actions brought against counties and their employees.[107] Although it has been unclear whether a timely notice of claim was a condition precedent to a civil rights action,[108] the Court of Appeals, in *Mills v.*

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[105] GML § 50-e (McKinney 1977 & Supp. 1983). A public corporation has been defined by statute as including municipal corporations, district corporations, and public benefit corporations. N.Y. GEN. CONSTR. LAW § 66(1) (McKinney Supp. 1983). The definition of a municipal corporation includes counties, cities, towns, villages, and school districts. *Id.* § 66(2).

New York courts have consistently upheld the constitutionality of section 50-e. *See, e.g.*, Brown v. Board of Trustees, 303 N.Y. 484, 489, 104 N.E.2d 866, 869 (1952); Guarrera v. A.L. Lee Memorial Hosp., 51 App. Div. 2d 867, 867, 380 N.Y.S.2d 161, 162 (4th Dep't 1976); *see also* Zipser v. Pound, 75 Misc. 2d 489, 490, 348 N.Y.S.2d 18, 19 (Sup. Ct. App. T. 2d Dep't 1972) (per curiam) (upholding constitutionality of section 52 of the New York County Law). This view represents that of the majority of states in this country, although there seems to be a growing "undercurrent of dissent." Graziano, *Recommendations, supra* note 103, at 365 (citations omitted). Among the states in which similar statutes have been held unconstitutional are Michigan, *see* Reich v. State Highway Dep't, 386 Mich. 617, 623-24, 194 N.W.2d 700, 702 (1972); Nevada, *see* Turner v. Staggs, 89 Nev. 230, 234, 510 P.2d 879, 883, *cert. denied*, 414 U.S. 1079 (1973); Washington, *see* Hunter v. North Mason High School, 85 Wash. 2d 810, 815, 539 P.2d 845, 850-51 (1975) (en banc); and West Virginia, *see* O'Neil v. City of Parkersburg, 237 S.E.2d 504, 509 (W. Va. 1977). These decisions have been based primarily on equal protection grounds. Reasoning that notice of claim statutes arbitrarily divide the class of tortfeasors into governmental tortfeasors and private tortfeasors and treat each of these subclasses differently, these courts have found that such statutes violate constitutional guarantees of equal protection. *See Reich*, 386 Mich. at 623-24, 194 N.W.2d at 702; *Turner*, 89 Nev. at 234, 510 P.2d at 882; *Hunter*, 85 Wash. 2d at 815, 539 P.2d at 851; *O'Neil*, 237 S.E.2d at 508-09.

[106] GML § 50-e(1)(a) (McKinney Supp. 1983-1984). The 90-day limit may be extended by the court upon the plaintiff's application for leave to serve a late notice. *Id.* § 50-e(5); *see infra* note 124 and accompanying text.

[107] N.Y. COUNTY LAW § 52(1) (McKinney 1972 & Supp. 1983-1984); *see* Keesler v. City of Peekskill, 1 Misc. 2d 744, 745, 152 N.Y.S.2d 919, 920 (Westchester County Ct. 1955); *cf.* McCormick v. State, 51 App. Div. 2d 28, 29, 378 N.Y.S.2d 991, 993-94 (3d Dep't 1976) (section 50-e made applicable to autonomous public corporation by section 469 of the Public Authorities Law), *aff'd*, 44 N.Y.2d 774, 377 N.E.2d 481, 406 N.Y.S.2d 37 (1978). It should be noted that section 50-e will not be used to bar a claim brought against county or municipal employees in their individual capacities in terms that would exclude municipal liability. *See* Beyer v. Werner, 299 F. Supp. 967, 969 (E.D.N.Y. 1969); Firester v. Lipson, 50 Misc. 2d 527, 533, 270 N.Y.S.2d 844, 851 (Sup. Ct. Nassau County 1966).

[108] The application of section 50-e has generally been limited to tort actions seeking money damages, *see, e.g.*, Alaxanian v. City of Troy, 69 App. Div. 2d 937, 937, 415 N.Y.S.2d 293, 294 (3d Dep't 1979) (malicious prosecution); Campos v. New York City Transit Auth., 93 Misc. 2d 708, 709, 403 N.Y.S.2d 832, 833 (N.Y.C. Civ. Ct. Bronx County 1978) (false arrest and assault and battery), or those seeking replevin, *see, e.g.*, Clark v. City of New York, 98 Misc. 2d 660, 661 414 N.Y.S.2d 481, 482-83 (N.Y.C. Civ. Ct. Kings County 1979); *cf.* 154 East Park Ave. Corp. v. City of Long Beach, 76 Misc. 2d 445, 450, 350 N.Y.S.2d 974, 980 (Sup. Ct. Nassau County 1973) (action based on quasi-contract and warranty claims not

County of Monroe,[109] recently held that failure to file such notice was fatal to a civil rights claim brought against a county.[110]

After her employment with the County of Monroe was terminated, the plaintiff in *Mills* commenced an action pursuant to section 296 of the New York Executive Law[111] and section 1981 of Title 42 of the United States Code,[112] alleging that she had been unlawfully discharged because of her race and national origin.[113] The defendant county moved for summary judgment on the ground that the plaintiff had failed to file a notice of claim.[114] The Supreme Court, Monroe County denied the motion,[115] but the Appellate Division reversed,[116] holding that section 52 of the County Law required that a notice of claim be served on a county in the

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affected by section 50-e), *modified*, 49 App. Div. 2d 949, 374 N.Y.S.2d 569 (2d Dep't 1975), *aff'd*, 73 App. Div. 2d 640, 423 N.Y.S.2d 453 (2d Dep't 1979), *aff'd*, 52 N.Y.2d 991, 420 N.E.2d 86, 438 N.Y.S.2d 288, *cert. denied*, 454 U.S. 858 (1981).

[109] 59 N.Y.2d 307, 451 N.E.2d 456, 464 N.Y.S.2d 709 (1983).

[110] *Id.* at 308-09, 451 N.E.2d at 456, 464 N.Y.S.2d at 709.

[111] N.Y. EXEC. LAW § 296(1)(a) (McKinney 1982). Section 296 of the New York Executive Law provides that it shall be unlawful

> [f]or an employer . . ., because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

Id. The protection against discrimination afforded by section 296 is apparently as broad as that conferred by the federal civil rights statutes and the United States Constitution. Mitchell v. National Broadcasting Co., 553 F.2d 265, 269-70 (2d Cir. 1977) (state court decision based on the New York Executive Law given *res judicata* effect by federal court in an action brought under section 1981 of title 42 of the United States Code).

[112] 42 U.S.C. § 1981 (1976). Section 1981 provides that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id. This statute has been construed as providing a remedy for discriminatory employment practices. *See, e.g.*, Dupree v. Hutchins Bros., 521 F.2d 236, 238 (5th Cir. 1975) (per curiam); Belt v. Johnson Motor Lines, 458 F.2d 443, 445 (5th Cir. 1972); Caldwell v. National Brewing Co., 443 F.2d 1044, 1046 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972).

[113] 59 N.Y.2d at 309, 451 N.E.2d at 456-57, 464 N.Y.S.2d at 709-10. The present action was initiated after the plaintiff had unsuccessfully attempted to invoke the arbitration clause of her union's collective bargaining agreement. *Id.*, 451 N.E.2d at 456, 464 N.Y.S.2d at 709.

[114] *Id.*, 451 N.E.2d at 457, 464 N.Y.S.2d at 710.

[115] *Id.*

[116] Mills v. County of Monroe, 89 App. Div. 2d 776, 776, 453 N.Y.S.2d 486, 487 (4th Dep't 1982), *aff'd*, 59 N.Y.2d 307, 451 N.E.2d 456, 464 N.Y.S.2d 709 (1983).

manner dictated by section 50-e.[117] Since the plaintiff had failed to file the requisite notice within 90 days after the cause of action had accrued, the Appellate Division granted the defendant's motion for summary judgment and dismissed the complaint.[118]

On appeal, the Court of Appeals unanimously affirmed, holding that the notice of claim requirement applies to civil rights actions under both the federal and state statutes.[119] Analogizing the restrictive effect of the notice requirement to that of a statute of limitations, Chief Judge Cooke determined that section 50-e is not inconsistent with the policy underlying the civil rights laws.[120] The Court found the notice requirement to be sufficiently flexible not to inhibit unduly the private enforcement of the civil rights laws.[121] The notice provisions, Chief Judge Cooke observed, do not apply to actions brought to vindicate a public interest.[122] Such cases are deserving of special treatment, the Court reasoned, because the rights of that portion of the public that the plaintiff represents may supersede those interests of the state that are served by strict application of the statutes.[123] The Court also pointed out that section 50-e expressly permits the plaintiff to apply to the court for leave to serve late notice.[124] Since the plaintiff in *Mills* had not

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[117] *Id.*

[118] *Id.*

[119] 59 N.Y.2d at 308-09, 451 N.E.2d at 456, 464 N.Y.S.2d at 709. Chief Judge Cooke wrote the Court's opinion, in which Judges Jasen, Jones, Meyer, and Wachtler concurred. Judge Simons did not take part in the decision. *Id.* at 313, 451 N.E.2d at 459, 464 N.Y.S.2d at 712.

[120] *Id.* at 310-12, 451 N.E.2d at 457-58, 464 N.Y.S.2d at 710-11. The Court stressed the proposition that a state law " 'cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation.' " *Id.* at 310, 451 N.E.2d at 457, 464 N.Y.S.2d at 710 (quoting Board of Regents v. Tomanio, 446 U.S. 478, 488 (1980) and Robertson v. Wegmann, 436 U.S. 584, 593 (1978)).

[121] 59 N.Y.2d at 311, 451 N.E.2d at 458, 464 N.Y.S.2d at 711.

[122] *Id.* Actions brought "to vindicate a public interest" were defined by the Court as those "that are brought to protect an important right, which seek relief for a similarly situated class of the public, and whose resolution would directly affect the rights of that class." *Id.* This distinction has been utilized in other actions dealing with similar statutory provisions. *See, e.g.*, Union Free School Dist. No. 6 v. New York State Human Rights Appeal Bd., 35 N.Y.2d 371, 380, 320 N.E.2d 859, 862-63, 362 N.Y.S.2d 139, 144-45 (1974).

[123] 59 N.Y.2d at 311, 451 N.E.2d at 458, 464 N.Y.S.2d at 711. The Court observed that the state's interests consist primarily of the preclusion of stale or fraudulent claims and the desire for prompt investigation and preservation of the facts surrounding legitimate claims. *Id.* at 310-11, 451 N.E.2d at 458, 464 N.Y.S.2d at 711; *see supra* note 103.

[124] 59 N.Y.2d at 311-12, 451 N.E.2d at 458, 464 N.Y.S.2d at 711. The statute stipulates that the court has discretion to extend the time for service of the notice of claim upon application by the plaintiff. GML § 50-e(5) (McKinney 1977). Application for leave to serve late notice formerly was required to be filed within a reasonable time after the expiration of

applied for such an extension, the Court returned to the public interest criterion in order to determine whether the notice provisions had been waived.[125] The Court concluded that the claim did not fall within the public interest exception because it was instituted solely to preserve the interests of the plaintiff and did not directly affect the rights of others.[126]

It is suggested that, by holding that the plaintiff's claim falls outside the public interest exception because it sought relief merely for her loss of wages and damage to her reputation, the Court of Appeals has unnecessarily narrowed the public interest standard set forth in *Union Free School District No. 6 v. New York State Human Rights Appeal Board*.[127] As the Court observed in *Human Rights Appeal Board*, the public interest exception is not rendered inapplicable to a case simply because that case seeks to enforce a private right to redress.[128] The important consideration, the Court noted, is that the advantages sought by a singular plaintiff in a civil rights action stem not from any individual entitlement, but rather "flow as an appropriate and intended consequence of the vindication . . . of the public's interest in the elimination of discrimination."[129] It is submitted that, by focusing on

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the 90-day period. Ch. 694, § 1, [1945] N.Y. Laws 1487. The statute was amended in 1976 to provide that such an extension shall not exceed the statute of limitations on a claim against a public corporation. Ch. 745, § 2 [1976] N.Y. Laws 3. Among the considerations that the court may utilize in determining whether to grant the extension are the plaintiff's physical and mental capacities, whether the plaintiff made an excusable error concerning the identity of a public corporation, and whether the delay would substantially prejudice a public corporation in maintaining its defense. GML § 50-e(5) (McKinney 1977).

[125] 59 N.Y.2d at 312, 451 N.E.2d at 458-59, 464 N.Y.S.2d at 711-12.

[126] *Id.*, 451 N.E.2d at 459, 464 N.Y.S.2d at 712. The Court found that the wrongful conduct attributed to the county in the complaint pertained only to the plaintiff, and that her action sought "relief only for *her* termination, which she allege[d] resulted from her opposition to the county's discriminatory practices and her race and national origin." *Id.* (emphasis in original).

[127] 35 N.Y.2d 371, 320 N.E.2d 859, 362 N.Y.S.2d 139 (1974). The *Human Rights Appeal Board* case involved a claim brought pursuant to section 296 of the Executive Law by a teacher who claimed that her employer's personnel policy discriminated against pregnant women. *Id.* at 378, 320 N.E.2d at 861, 362 N.Y.S.2d at 143. At issue was the application of section 3813 of the New York Education Law, which requires that notice be served in accordance with section 50-e of the General Municipal Law when an action or special proceeding founded on tort is commenced against a school district or designated officials. *Id.* at 380, 320 N.E.2d at 863, 362 N.Y.S.2d at 145; *see* N.Y. EDUC. LAW § 3813(2) (McKinney 1981). The Court of Appeals held that the notice provisions did not apply to an action brought to vindicate the public's interest in the elimination of discrimination based on sex. 35 N.Y.2d at 380, 320 N.E.2d at 863, 362 N.Y.S.2d at 145.

[128] *See* 35 N.Y.2d at 380, 320 N.E.2d at 863, 362 N.Y.S.2d at 145.

[129] *Id.*; *see* Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968) (per curiam). In

the nature of the remedy sought by the plaintiff rather than on the rights alleged to have been violated, the Court misinterpreted the plaintiff's claim as one brought to protect a merely private interest.[130] It is suggested that, because the action should properly be classified as one brought to vindicate the public's interest in the elimination of racial discrimination,[131] the notice requirements ought to have been waived.

Waiver of the notice of claim requirements is supported not only by the public's interest in the elimination of discrimination, but also by an examination of the practical consequences of the Court's holding. The Court's application of the notice provisions, it is suggested, will prove ineffective in achieving either the goals of the civil rights statutes[132] or the goals of section 50-e.[133] Redress for violation of section 1981 may be sought in either the federal or the state courts.[134] Since federal courts in New York do not require

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Newman, the Supreme Court intimated that actions brought to enforce the civil rights laws are considered to be in the public interest. *Id.*; *cf.* Niagara Mohawk Power Corp. v. City School Dist., 88 App. Div. 2d 167, 169, 453 N.Y.S.2d 807, 809 (3d Dep't 1982) (notice requirement waived in cases in which the public interest is vindicated, even though benefit inures to plaintiff), *aff'd*, 59 N.Y.2d 262, 451 N.E.2d 207, 464 N.Y.S.2d 449 (1983).

[130] The varied instances in which New York courts have found a public interest indicate the willingness of these courts to undertake an expansive reading of the "public interest" exception. *See, e.g.*, Niagara Mohawk Power Corp. v. City School Dist. of Troy, 88 App. Div. 2d 167, 169, 453 N.Y.S.2d 807, 809 (3d Dep't 1982) (Education Law notice requirement inapplicable to taxpayer's suit for refund), *aff'd*, 59 N.Y.2d 262, 451 N.E.2d 207, 464 N.Y.S. 2d 449 (1983); Board of Educ. v. State Div. of Human Rights, 38 App. Div. 2d 245, 248, 348 N.Y.S.2d 732, 735 (4th Dep't 1972) (per curiam) (invocation of collective bargaining agreement grievance procedure does not preclude filing of administrative complaint charging discriminatory practices, because the grievance procedure alone would not vindicate the public interest), *aff'd mem.*, 33 N.Y.2d 946, 309 N.E.2d 130, 353 N.Y.S.2d 730 (1974); *cf.* New York State Labor Relations Bd. v. Holland Laundry Co., Inc., 294 N.Y. 480, 495, 63 N.E.2d 68, 75 (1945) (prior favorable court judgment does not preclude state labor board proceeding against employer's National Labor Relations Act violations, since such proceeding "vindicates a public right"). It is suggested that a broad definition of "public interest" would be more consistent with the remedial purpose of section 1981. *See* Taylor v. Jones, 495 F. Supp. 1285, 1290 (E.D. Ark. 1980), *modified*, 653 F.2d 1193 (8th Cir. 1981); Player v. Alabama Dep't of Pensions & Sec., 400 F. Supp. 249, 265 (M.D. Ala. 1975), *aff'd mem.*, 536 F.2d 1385 (5th Cir. 1976).

[131] *Cf.* Taylor v. Jones, 495 F. Supp. 1285, 1295-96 (E.D. Ark. 1980) (section 1981 actions serve the important public purpose of eradicating racial discrimination and its detrimental effect on society), *modified*, 653 F.2d 1193 (8th Cir. 1981).

[132] *See id.*; *see also* Pauk v. Board of Trustees, 654 F.2d 856, 861 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). It is anomalous to apply a state statute that has the effect of restricting remedies against public officials to actions brought pursuant to a federal statute specifically designed to augment such remedies. *Id.*

[133] *See supra* note 103.

[134] *See* 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 90.10 (1983). Federal

that a notice of claim be filed,[135] potential plaintiffs who have allowed the 90-day period to lapse will still have the option of bringing their civil rights actions in federal court. Thus, the interests of both the municipal corporations and the plaintiffs in having their disputes litigated in the state courts will be frustrated.

Finally, it is suggested that the policy objectives underlying use of the notice of claim are less than compelling in the context of employment discrimination. Section 50-e was designed to afford the municipality a sufficient opportunity to investigate the circumstances surrounding a claim before the facts become clouded.[136] A public employer, however, particularly one subject to arbitration under a collective bargaining agreement, will invariably document facts and incidents justifying employee discharges.[137] Thus, the possibility of manipulation or dissipation of evidence is substantially more remote than in an ordinary tort action.

Since the imposition of the notice barrier will have little of its intended practical benefits in employment discrimination cases, it

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district courts have been granted jurisdiction over § 1981 actions by 28 U.S.C. § 1343 (1976 & Supp. V 1981). *Id.*

[135] *See, e.g.*, Brandon v. Board of Educ., 487 F. Supp. 1219, 1224 (N.D.N.Y.) (notice of claim requirements inapplicable to section 1983 actions), *aff'd*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); Davis v. Krauss, 478 F. Supp. 823, 825 (E.D.N.Y. 1979) (notice of claim provisions "not valid" in civil rights actions); Paschall v. Mayone, 454 F. Supp. 1289, 1298 (S.D.N.Y. 1978) (much federal authority supports inapplicability of notice of claim statutes to section 1983 actions). These courts have uniformly held that the federal interest in the enforcement of the civil rights laws supercedes the state policy underlying the notice of claim. *See, e.g., Brandon*, 487 F. Supp. at 1224; *Davis*, 478 F. Supp. at 825.

In support of its rejection of the federal position, the *Mills* Court cited Board of Regents v. Tomanio, 446 U.S. 478, 488 (1980), and Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465 (1975), and drew from them the conclusion that the "general restrictive effect of a State notice of claim requirement does not of itself bar its application to Federal civil rights actions." 59 N.Y.2d at 311, 451 N.E.2d at 458, 464 N.Y.S.2d at 711. These cases, however, do not discuss state notice of claim requirements, but state statutes of limitation or repose. *See Tomanio*, 446 U.S. at 492; *Johnson*, 421 U.S. at 467. It is suggested that this body of precedent is inapposite in the notice of claim context. Indeed, at least one federal court has been willing to apply a state statute of limitation while rejecting its notice of claim requirement as an unacceptable barrier to a civil rights action. *See* Davis v. Krauss, 478 F. Supp. 823, 825 (E.D.N.Y. 1979).

[136] *See supra* note 103.

[137] *See* R. PERES, DEALING WITH EMPLOYMENT DISCRIMINATION 183 (1978). Documentation of discharge, which is utilized primarily for the employer's own protection, may be in the form of written warnings, memoranda submitted by supervisors, production records, incident reports, absenteeism records, and the like. *Id.* In *Mills*, since the plaintiff's effort to obtain relief under the collective bargaining agreement had forced the county to defend her discharge previously, *see* 59 N.Y.2d at 309, 451 N.E.2d at 456, 464 N.Y.S.2d at 709, it is not unreasonable to assume that the county would have preserved the evidence in its favor.

is suggested that the Court of Appeals reconsider this unnecessary impediment to the vindication of public employees' civil rights.

Kevin M. Berry

DEVELOPMENTS IN NEW YORK LAW

Physician-patient privilege prevents disclosure of patient's identity to grand jury homicide investigation

In 1828, New York became the first state to recognize a physician-patient privilege,[138] thus protecting all information and confidences regarding medical treatment and diagnosis.[139] Notwith-

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[138] *See* 5 WK&M ¶ 4504.01, at 45-175 (1982). The statute of 1828 read as follows:

> No person duly authorized to practice physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him, as a surgeon.

Id. (quoting N.Y. REV. STAT. 1828, 406 (pt. 3, ch. 7, tit. 3, art. 8, § 73)).

At common law, the prerequisites to the creation of a privilege were, *inter alia*, that the communication originated in an understanding of confidentiality, and that such confidentiality was essential in maintaining the relationship of the parties. 8 J. WIGMORE, EVIDENCE § 2285, at 531 (3d ed. 1940). For example, the communications between an attorney and client have received protection since the sixteenth century, making it the oldest of the privileged communications. Id. § 2290 at 547. Another common-law privilege, the spousal privilege, proscribes the testimony of the spouse of a party to an action. *See* RICHARDSON ON EVIDENCE § 445, at 437 (J. Prince 10th ed. 1973). Although the physician often was the recipient of his patient's confidences, no such privilege existed at common law for doctors. *See* 8 J. WIGMORE, *supra*, § 2380, at 802. Early English law indicated that neither a voluntary vow of secrecy nor the privacy of the relation alone were sufficient to establish a privileged communication. *See* C. DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT 10-12 (1958). In the 1776 trial of the Duchess of Kingston, Lord Mansfield ruled that a physician was bound to reveal a patient's secrets and " 'ha[d] no privilege, where it is a material question, in a civil or a criminal case . . . .' " *Id.* at 11-12 (quoting Duchess of Kingston's Trial, 20 How. St. Tr. 355 (1776)).

Although disclosures to a physician were not protected under the common law, the ethical principles of the medical profession, like those of the legal profession, compelled nondisclosure of the patient's confidences. *See* C. DEWITT, *supra*, at 22-23. The source of this ethical consideration is the Hippocratic Oath, which includes the following: "Whatever, in connection with my professional practice or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret." E. HAYT, L. HAYT & A. GROESCHEL, LAW OF HOSPITAL, PHYSICIAN, AND PATIENT 637 (1952); *see* Note, *Legal Protection of the Confidential Nature of the Physician-Patient Relationship*, 52 COLUM. L. REV. 383, 383 (1952).

[139] *See* CPLR 4504(a) (1963 & Supp. 1983). Generally, four prerequisites must be established by the person invoking the physician-patient privilege before it can be used to prevent disclosure: 1) the physician was authorized to practice medicine or is a professional falling within the statutory guidelines; 2) the information was necessary for treatment; 3) the information was acquired as a result of the physician-patient relationship; and 4) the