



OFFICE OF THE CORPORATION COUNSEL

MEMORANDUM

TO: Kathleen Falk
County Executive

FROM: Kristi A. Gullen
Assistant Corporation Counsel

DATE: December 6, 2005

RE: AJR 67/SJR 53

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Given that almost two years have passed since I first opined that the proposed constitutional amendment to define a valid marriage could potentially endanger the domestic partner benefits Dane County offers to its employees, I revisited the issue to determine whether that opinion was still valid. Not only do I stand by my original opinion, but I now believe that the threat imposed by the proposed constitutional amendment is real and substantial.

Although supporters of the proposed amendment steadfastly maintain that its language does not prohibit employers from offering domestic partner benefits to employees, experience from other jurisdictions which have passed constitutional amendments defining marriage, reveals that any such argument is disingenuous. For example in Michigan the passage of the constitutional amendment almost immediately spawned legal challenges to the constitutionality of domestic partner benefits offered by employers. An opinion issued by the Michigan Attorney General declared that the recent amendment to that state's constitution prohibited the continuation of domestic partner benefits to any employee not covered by a collective bargaining agreement on the effective date of the amendment and prohibited governmental entities from entering into future agreements offering domestic partner benefits.¹ This opinion was subsequently challenged by employees affected by it and a lower court judge overturned the AG's opinion; however, the Michigan Court of Appeals

¹ The Michigan Attorney General opinion can be found at www.ag.state.mi.us/opinion/datafiles/2000s/op010247.htm

recently granted a request to temporarily set aside that ruling² until the Michigan Supreme Court can decide the issue.

Domestic partner benefits provided by taxpayer supported entities (such as those offered by Dane County) are particularly vulnerable to such legal challenges. Since supporters of 2005 AJR 67/SJR 53 cannot guarantee that no taxpayer would bring a lawsuit asserting that publicly funded domestic partner benefits are unconstitutional and further cannot guarantee how a judge would ultimately decide the issue, I believe that passage of the constitutional amendment would place the domestic partner benefits offered by Dane County at serious risk to legal challenges to the constitutionality of those benefits involving years of litigation.

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² National Pride at Work Inc v. Governor of Michigan, No.26587 (Mich. Ct. App, 2005)
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