Constitutional Law I – Answer to Practice Question 1

(Constitutional Law I.B.3.; II.A.1.; III.A.2.)

Legal Problems:

(1) Does Congress have authority under the Commerce Clause to regulate employer precautions against workplace violence?
(2) Do federalism principles bar Congress from applying the Act to state agencies as employers?
(3) Does the Eleventh Amendment bar the employee's suit against the state?

Summary

Under the Commerce Clause, Congress has power to regulate economic activities that substantially affect interstate commerce. Here, the Act regulates a non-economic aspect of an economic activity (i.e., the employment relationship) that has a substantial effect ($5 to $10 billion per year) on interstate commerce. This regulation probably falls within the scope of the Commerce Clauses, although at least one case can be read to suggest the opposite possibility. The Act does not violate federalism principles embodied in the Tenth Amendment to the Constitution by improperly commandeering states or by regulating state employers differently than private employers. However, the employee's federal court lawsuit is barred by the state agency's Eleventh Amendment immunity, the Act cannot abrogate that immunity.

Point One (50%)

Congress has power under the Commerce Clause to regulate workplace violence only if the court concludes that the Act regulates an economic activity with a substantial aggregate effect on interstate commerce.

In *United States v. Lopez,* 514 U.S. 549 (1995), the Supreme Court of the United States clarified that Congress may enact three types of regulations under the Commerce Clause. First, Congress may regulate the channels of interstate commerce, which are the pathways through which interstate travel and communication pass. Examples of the channels include interstate highways and phone lines. Second, Congress may regulate the people and instrumentalities that work and travel in the channels of interstate commerce. Examples include people such as airline pilots and flight attendants, as well as the airplanes on which they travel. Third, Congress may regulate activities that substantially affect interstate commerce.

The Act does not fit within either of the first two *Lopez* categories. First, the statute applies to any workplace, regardless of its location, and so it does not narrowly regulate the channels of interstate commerce. Second the Act applies to all employees and not only those people or instrumentalities in the channels of interstate commerce. Consequently, the Act will be valid only if it regulates an activity that substantially affects interstate commerce.

The key to satisfying the substantial effects requirement is the threshold determination of whether the regulated activity is economic or commercial in nature. When Congress regulates an economic or commercial activity, the Court will uphold the regulation if Congress had a rational basis for concluding that the class of activities subject to regulation, in the aggregate, has a substantial effect on interstate commerce. Aggregation on a national scale typically makes this an easy standard to meet. On the other hand, if the regulated activity is not economic or commercial in nature, the Court will not aggregate to find a substantial effect, and the standard becomes extremely difficult to meet. *See Gonzales v. Raich,* 545 US. 1 (2005); *United States v. Morrison,* 529 U.S. 598 (2000); *Lopez, supra*.

Therefore, the key question is whether violence in the workplace is an economic or commercial activity. In *Morrison*, the Court held that Congress exceeded its commerce power by enacting a statute giving a cause of action to the victims of gender-motivate violence. It therefore can be argued here, as *Morrison* held, that acts of violence are not economic or commercial in nature, and thus in applying the substantial effects test, the court may only measure the effect of the particular act of violence at issues in the suite and not the aggregate effect of all acts of violence in the workplace.

One could argue that *Morrison* is distinguishable because the statute at issue here is limited to violence in the workplace. The workplace is an economic environment, and workplace violence directly impedes productivity of the workplace. The court therefore should conclude that the statute at issue here is an economic regulation and thus is within the commerce power of Congress because, based on the facts given in the problem, Congress had a rational basis for concluding that workplace violence, in the aggregate, has a substantial effect on interstate commerce.

Point Two (20%)

<u>The Act does not violate federalism principles because it regulates both public and private employers on the same terms.</u>

In *Garcia v. San Antonio Metropolitan Transportation Authority*, 469 U.S. 528 (1985), the Supreme Court held that Congress may regulate the states on the same terms as private actors. For example, *Garcia* upheld application of the federal minimum wage and maximum hour law to both public and private employers. In *New York v. United States*, 505 U.S. 144 (1992), however, the Court held that Congress may not "commandeer" the state to regulate private conduct. In *New York v. United States,* the Court struck down a federal statute that commandeered state to regulate private disposal of low-level hazardous waste.

The Act does not commandeer the state to regulate private conduct. Instead, the Act merely requires both public and private employers to obey the same federal requirement- to address workplace violence under the threat of civil liability. It is true that the state, as an employer, must adopt policies and regulations to implement the Act's mandates. But *Reno v.*

Condon, 528 U.S. 141 (2000), clarifies that a federal mandate requiring state personnel to alter their own activities is not unconstitutional commandeering.

Point Three (30%)

<u>The Eleventh Amendment bars the employee's federal court lawsuit against the state, and the Act does not validly abrogate that immunity.</u>

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Despite the text of the Eleventh Amendment, the Supreme Court has interpreted it to bar lawsuits between a state and one of its own citizens, as well as lawsuits that arise under federal law. *See Seminole Tribe of Florida v. Florida,*, 517 U.S. 44 (1996). Further, this immunity extends to state agencies. Consequently, the Eleventh Amendment would bar the employee's lawsuit against that the state agency in federal court, unless the Act validly abrogates the state's immunity.

A federal statute abrogates Eleventh Amendment immunity if, first, the statute unambiguously asserts that it does so, and second, Congress enacted the statute under a power that may abrogate Eleventh Amendment state immunity. Here, the Act satisfies the first requirement because Section 204 unequivocally attempts to abrogate state Eleventh Amendment immunity. The Act fails the second requirement, however, because Congress did not pass the Act under a grant of power that may abrogate state immunity. In *Seminole Tribe*, the Court held that Article 1, section 8 of the Constitution does not grant Congress power to abrogate state sovereign immunity. (The Supreme Court has held that Congress can abrogate state immunity when it exercises it powers under amendments that postdate the Eleventh Amendment. By way of contracts, Section 5 of the Fourteenth Amendment does grant Congress that power. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Fourteenth Amendment)). Because the Act does not validly abrogate the state's Eleventh Amendment immunity, the District Court should dismiss the employee's lawsuit.