LECTURE #11 – UNIQUE CONCEPTS IN ADMINISTRATIVE LAW

You've heard me talk about some of the basics of administrative law and some of the things that have gone on to make the US a more administratively oriented nation even though we started in America distrusting government, not wanting to have much government, if at all, and not wanting to have administrative agencies and government officials interfering in our lives. We need government to protect the consumer, to apply the expertise of science and technology through government administrative agencies to protect our consumers who are unable to know exactly what goes into prescription drugs, medications, what goes into food, whether or not radiated food or food that's had its DNA changed or been tampered with biologically, whether or not that is safe for us – only scientists can know that, and only they can, through a government agency, protect us. So the US has begrudgingly, slowly come to have a modern administrative state. In today's Lecture #11, you will see I entitled it "Unique Concepts" or different concepts in American administrative law – something that doesn't quite fit into the basics of administrative law. We will see interesting and important concepts that we've adopted in the US. 1.) One of them is our whistleblower statutes. A whistleblower means someone who is blowing a whistle and telling on, squealing on, making public some kind of illegal act he sees another government official doing. So we have statutes encouraging one government agency official to tell the public and his superiors when he sees gross abuse of money, gross abuse of power, gross misuse of spending money. A Whistle Blower Statute encourages that employee to come forward and either testify in Congress, tell his administrative agency head or tell some government attorney in Washington, who can then prosecute for it or try to stop it and refer it to Congress to try to stop it from happening. Basically we have a Whistleblower Protection Act of 1984 that says that if government personnel disclose information about other employees that shows gross mismanagement or gross waste of money that they are protected against their superiors terminating their employment, or firing them as we call it, lowering their pay, or retaliating against them for what they have done. There are many lawsuits brought by employees saying they were not given a raise, the were not given a promotion, they were not given a job in another agency because they were tattletales, people who go and complain against and disclose wrongdoing by others. In many cases it's minor wrongdoing, so when they bring lawsuits or complaints about it, it becomes difficult to know whether when one employee discloses that another employee has wasted money by travel to a foreign country, whether or not that is gross mismanagement. Gross mismanagement, gross waste of funds means lots and lots of money. The biggest disclosure and the biggest action I can think of that has occurred in the last 10 or 15 years under the Whistleblower Act Statute is where some employees in the US Department of Defense came forward and said, "We are disclosing the fact that the Department of Defense purchases and buys equipment, materials, and supplies for too high an amount of money. I can still remember one day the front page of the newspaper

had a picture of a toilet seat on it because it was disclosed that the Department of Defense was spending $680 each for toilet seats under the purchasing arrangements of the US Department of Defense. They were obviously spending much more money, thousands and millions of dollars for all their military things, but they gave a small non-secret item like a toilet seat in order to show what overpayment must be for large secret military items. The dept of defense actually fought back against the people who were trying to disclose this mismanagement, this misuse of government taxpayer money, and tried to get a law passed that said if you disclose secret or what they call classified information, you will be prosecuted. You may not disclose classified information so they tried to stop employees from disclosing the overspending and the excessive spending by agency officials in the military, the department of defense, the army, the navy. They were spending too much money for missiles, torpedoes, airplanes, everything – all the way down to the smallest items, toilet seats, screws, and briefcases. They were spending twice as much as anyone should spend for those things. There's a current lawsuit going on from what we call our Department of Interior by an accountant, a CPA, in the Department of Interior that owns and manages US government owned land. There's a lot of US government owned land just as I'm sure there's a lot of Russian government owned land, like Sachalin Island, an enormous island with a lot of oil on it. The US government leases out its land to oil companies to drill for oil and it's supposed to receive from those private oil companies large amounts of money. This accountant is suing the government on behalf of many taxpayers for the fact that the US government, the Department of Interior, the whole agency, its employees, were not collecting as much money as they should have from those companies for the oil that those oil companies were pumping. If this man is successful, he is subject to receiving anywhere from 5 to 10% of the money he recovers for the government when they can discover and can recover some money from these oil companies. He waited until he retired before he would bring this lawsuit because he was afraid of losing his job or receiving retaliation.

2.) The second concept I consider unique and unable to be classified with everything else is something the US does that's more in keeping with all the lawyers we have in America and that is the Private Attorney General concept. A Private Attorney General is someone who is a private party, a private lawyer, who brings a lawsuit to protect the public. I, as a private lawyer, can bring a lawsuit against a restaurant or a whole chain of restaurants for not having ramps for the handicapped for wheelchairs, for not having handicapped parking spaces in front of the restaurant for handicapped, disabled people to park in and not having railings for the handicapped to hold onto. If I win, of course, I don't necessarily win any money for the clients, for the disabled people. I simply win the fact that there may be some parking spaces put in front of the restaurant; there may be some ramps built up to allow wheelchairs to enter the restaurant. There's no money involved so I can't win any money for my clients, the disabled, but there are provisions in these laws, called Private Attorney General Laws, that allow the attorney who is successful to receive a reasonable attorney's fee. And in the

disabled laws and many other areas of law it is encouraged that the attorney's fees be large and reasonable. Let me give you an example: I've been to court many times on behalf of tenants. When I win for a tenant in court against a landlord I ask for an attorney fee because the law allows a private attorney fee in that case. The judge will say, "How many hours did you spend, Mr. Ritter? And how much attorney's fee do you expect?" I will say, "Judge, I spent 10 hours on this case. I normally charge $300 an hour, so I want a fee of $3,000." Many times a judge will say, "I do not award more than $100 to $150 an hour. In your case I will award you $150 an hour, and I will award you $1500." So many times the judges like to play Solomon – cut the baby in half – they will cut in half what you ask for, but they often will eliminate or limit the attorney's fees that they award a prevailing or successful party in a suit. The private attorney general statutes say they must not do that – that they need to award a standard, normal, reasonable attorney's fee. There's another important area where a private attorney general is used in the US Civil Rights Laws. If someone brings a civil rights case and says I am being discriminated against because #1 I am black – that's a violation of civil rights, #2 because I speak Spanish, #3 because I'm of the Jewish religion or faith. In many cases if the suit is successful, there will simply be an injunction to stop that company or business from discriminating against black people – you must now allow black people in your restaraunt, in your school. And so, what kind of money is there again for the attorney to win? None, but the attorney is allowed a reasonable attorney's fee and again, that attorney would not do that and would not represent those people unless he knew that he was going to receive a normal good fee at the end of that lawsuit if he is successful. The Private Attorney General concept is used in civil rights laws quite often to enforce civil rights laws and it's used in the handicapped and disabled laws. There are times when there are private attorney generals allowed under the water pollution act. If some private citizen brings suit to stop someone from dispensing private water pollution, he may start first before the Environmental Protection Agency, an administrative agency, and if that agency does not order the apartment building or factory to stop violating the clean water act, the lawyer then may go to court. And for his hours and time spent as a lawyer before the administrative agency and before the court, he is allowed a reasonable attorney fee. Again, a private attorney acting to enforce public interest, something normally a government lawyer would be doing, but in many cases a government lawyers just cannot do everything, cannot enforce every law, so the US has figured out a way to allow private attorneys – of whom we have many, almost too many some people say – to earn legal fees and help the public by bringing lawsuits in the public interest. I have a friend who was an attorney for a student in a lawsuit against the County School Board for allowing teachers to paddle and spank students to discipline them. He appealed all the way to the US Supreme Court before he won a ruling enjoining the school board and teachers from paddling students as a matter of the students' civil rights. He won a $70,000 attorney fee award.

3.) We have an interesting administrative law concept in the US called the Doctrine of Deregulation. Very much in keeping with the American concept and

philosophy that I told you about on the first day of class, that America believes that the best government is the least government, and so we still have not ended our attempts to stop government from interfering in normal day to day life – especially in business. The deregulation movement is anti-regulation, to end administrative regulation, the process by which government, such as Congress or Legislatures, will remove restrictions generally on business, in order to encourage more efficient operation of markets. So even though we know some regulation is necessary to keep businesses honest and keep them from cheating and misrepresenting, we try to keep government out of business. In the last 25 years the deregulation process has caused the government to stop regulating 1.) Airlines – we no longer say how many airlines there can be and who can be an airline. We used to have 20 airlines and there are now 40 airlines, 2.) Telephone companies – there are many more telephone companies, 3.) Cell phone Companies, 4.) Banks and Savings and Loan industries, 5.) Trucks, 6.) Cable Television. The US, in the area of business has definitely got a strong movement encouraging less regulation and interference in business. Just the opposite is true on consumer protection. Deregulation is not a movement that has come into consumer protection. Some people get very upset about the Food and Drug Administration and the various federal agricultural departments that stop fertilizer from being sold and distributed. Consumers get very upset about drugs that are put on the market, but no one says we should stop regulating drugs, food, fertilizers, chemicals that are put on food. We know that we need that scientific expertise when it comes to consumer protection. But in business, America and its free enterprise system still believes we should have as little interference and restriction and regulation as possible. We have had administrative agencies that regulated everything. For instance, all the railroads used to be regulated under the Interstate Commerce Commission, every rate, every charge a railway had, everything that a railroad did used to be heavily regulated for over 100 years. It was the first administrative agency regulation in the US. It existed before 1900. 25 years ago the Interstate Commerce Commission was abolished and railroad regulation was ended.

4.) The last doctrine I've put here under what I call Unique Aspects of Administrative law in the US, is the Doctrine of Exhaustion of Administrative Remedies. The definition of this doctrine is: that anyone who files a lawsuit, before he brings a private lawsuit, a private civil action, and goes into court, must first exhaust all of his/her administrative remedies before the administrative agencies before he can bring a lawsuit for money damages. This is a very important doctrine in the US. Remember, I told you there are over a million lawyers and that many of them make their livings by getting contingency fees, getting percentages of large amounts of money awards and judgments that they've won for their clients. So lawyers are always trying to encourage clients to bring lawsuits for large amounts of money. They don't want to go to administrative agencies to work out their complaints. They want to go to court where they will get a jury of private citizens to award a large amount of money of which they will receive a percentage. The Doctrine of Exhaustion of Administrative Remedies can often stop these lawsuits. Before a lawyer can go to court and complain on

behalf of a client, he must exhaust the administrative remedy first. For instance, one I saw recently was in the field of Education for Disabled or Mentally Retarded Children. We have a federal law in the US which provides administrative remedies for the education of the handicapped. Many parents will complain that their children, who are blind for instance, were not given adequate education and training in the Braille system. They were not given Braille books to be able to learn. After a year or two of this they will go to court and try to claim that their child has been damaged and try to win a large amount of money and lawyers will go to court to do this. I recently saw a series of lawsuits dismissing all these lawsuits for money by parents of children with handicaps, saying they must first go to the administrative agency and exhaust administrative remedies. That is because education for handicapped children has been channeled into an administrative process that applies administrative expertise to promptly resolve grievances and complaints about the teacher, the materials, the place and the time that is spent taking handicapped children and educating them. They don't allow the parents to sit back and do nothing and then complain that they should win money from the state and from the government for not educating their children. They force them to go into administrative agencies to see that the administrators, who have expertise in the area of educating handicapped children, are able to analyze and assess the education. The courts have said it's better to allow people who have experience in that area to determine what is necessary than to just go into court and allow judges and juries to apply general knowledge and probably sympathy for the disabled. What would happen is they would win large amounts of money because everyone is sympathetic to handicapped and disabled children. Instead they must go and exhaust their administrative remedies.

Exhaustion of Administrative Remedies is common in employment discrimination, when someone claims they were discriminated against because they are black and they were fired, or they weren't hired because they were the wrong religion, they were the wrong sex, or they didn't do something the employer wanted for sexual reasons. If they go to court and sue they will be dismissed or delayed until Administrative Remedies are sought.. You'll notice one of the cases in my You Be The Judge IV book is a case of a woman who was sexually discriminated against and she went to court and sued the supermarket company for her manager's discriminatory, sexually suggestive remarks. In fact there is a doctrine of exhaustion of administrative remedies that says the Equal Employment Opportunity Commission, must be contacted first in a case of discrimination on the job based on race, religion, or sex. That agency, however, does have a form that says that if you, the complainant, waive your administrative rights, you can go right to court. Many people feel that going to an administrative agency delays judgment so they will go to court because they feel justice is faster when they go to court.