

Maryland Lawyer

News and analysis of legal matters in Maryland

Battling the NFL

'Relentless' lawyer first to win pension appeal against league

BY DANNY JACOBS

Danny.Jacobs@TheDailyRecord.com

When Cy Smith decided to take on the National Football League six years ago, he was not thinking about the notoriety that would follow. All he saw was an employee with a compelling case against his employer's pension plan. That the employee was pro football Hall of Fame center Mike Webster was secondary.

"It looked like a grave injustice had been done to Mike and his family," Smith says.

Similarly, Smith was unfazed to learn the league's pension plan had never lost an appeal in federal court.

"I don't know how that is true," he recalls thinking at the time. "If we can put the case together correctly, I think we have a very compelling argument."

Smith's landmark victory in the Webster case has in part sparked debates about the safety of current players and the safety net for retired players that could result in a lockout this year. It also has made representing disabled, retired football players a small but vibrant part of Smith's practice, even as it has caused him to question his lifelong affinity for the sport.

Time and again, though, he returns to what, in his mind, is the underlying legal issue in all of the cases: the league's and its players union's refusal to give employees their entitled benefits.

"They've already agreed to make this payment. Now the issue is whether they'll live up to their word," says Smith, a partner with **Zuckerman Spaeder LLP** in Baltimore. "If that costs money, the NFL is one of if not the richest sports leagues in the entire world. And they can well afford it."

Those who know Smith are not surprised by willingness to take on one of



FILE PHOTO

Cy Smith, a partner at Zuckerman Spaeder LLP, has represented seven former football players against the NFL's pension plan. He won more than \$1.5 million for the estate of Pro Football Hall of Fame center Mike Webster in 2006.

the biggest sports businesses in the world.

"He's extremely talented and relentless," says Herbert Better, who hired Smith 20 years ago. "He can't be intimidated."

Becoming plaintiffs' counsel

The 50-year-old Smith drapes his jacket over a conference room chair in Zuckerman's Pratt Street office before taking a seat to discuss his battles with the pension plan. He sits upright, his hands and blue cufflinks occasionally gliding across the table to emphasize his statements. His work on behalf of retired players led him to testify before Congress in 2007 alongside some of the game's greats, but he says matter-of-factly that he'd be "perfectly happy" doing other cases.

"Because pro football is a big deal in America, and because there is an inherent unfairness in the way that a lot of players have been treated, it's gotten

a lot of attention," he says in his steady baritone. "It's fun to do it because you get great results for your clients — sometimes, not always — and it's part of the law people find inherently interesting."

How Smith got involved with the pension plan cases reflects his career trajectory. He arrived in Baltimore in 1990 after four years at a big firm in Washington, D.C., looking for more opportunities as a trial lawyer in a smaller city. He primarily handled federal criminal cases through the mid-1990s and thought he would become a white-collar criminal defense lawyer, like many of his Zuckerman colleagues. But he realized his never having been a prosecutor would hold him back.

"I had the skills, but I didn't have the contacts," he says. "It might have worked but it would take forever, which was very frustrating."

Smith also took on the occasional civil case, including a 1996 federal lawsuit on behalf of three marine engineers

who argued they did not receive benefits they were promised under their union's pension plan. He worked for a contingency fee when the clients could not afford him. Smith won at trial in 1999 and on appeal three years later. He found the work interesting and enjoyable and decided to continue litigating, primarily on a contingency basis.

"I decided I would look for a broadly focused but, I hoped, higher-end plaintiffs' practice," he says.

In the past decade, Smith has represented the son of real estate mogul and corporate raider Victor Posner in what turned out to be a \$14 million settlement over a contested will; a **Baltimore City Circuit Court** judge who is challenging the state's mandatory judicial retirement age; senior citizens accusing Maryland of denying them Medicaid benefits; and a man who sued his employer after he was kidnapped and tortured in the Philippines and the company initially refused to pay the ransom or inform his family.

"He has a unique combination of intelligence with a keen sense of justice," says Richard S. Gordon of **Quinn, Gordon & Wolf** Chtd. in Towson, who has known Smith personally and professionally for a decade.

Gordon, a consumer class-action lawyer, is one of the legal "experts" Smith has worked with over the years.

"My approach is," Smith says, "unless it is an extremely specialized area

of the law, where I might have to get someone else involved, I can handle it."

The fight for Webster

Another outside counselor with whom Smith has worked is Bob Fitzsimmons, a West Virginia lawyer who represented Mike Webster in 1997 when the former Pittsburgh Steeler filed his first disability claim with the NFL pension plan. Webster, who retired in 1990 after playing 16 seasons, had injuries from his playing days — including brain damage — so severe he reportedly used a Taser on himself in order to fall asleep at night.

A player seeking disability benefits from the Bert Bell/Pete Rozelle NFL Player Retirement Plan, as the pension fund is formally known, first appears before a two-person Disability Initial Claims Committee consisting of a representative from the league and one from the players' union. Appeals are heard by a six-member Retirement Board consisting of three league and three players' union representatives. Both levels involve evaluations by neutral physicians. Subsequent appeals can be filed in fed-

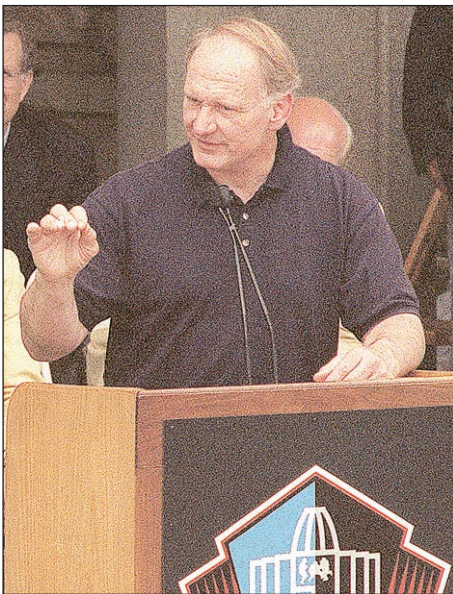
eral district court.

Players whose injuries are deemed "total and permanent" can receive annual benefits ranging from \$18,000 to \$224,000 depending on how soon the disability surfaces after a player retires. [See "Classifications of disability benefits" above.] Webster was awarded "football degenerative" benefits totaling \$110,000 a year, meaning the plan found he became totally and permanently disabled because of his playing career within 15 years of his retirement.

But five doctors — including one picked by the plan — agreed Webster's brain injuries first surfaced near the end of his playing career, making him eligible for the maximum annual benefit. Appeals to the pension plan by Webster for the highest level of benefits were unsuccessful.

"It was one of the most outrageous decisions a board can make," Fitzsimmons says. "It was absurd, ridiculous and unfair."

Fitzsimmons was working with Zuckerman Spaeder on a shareholders' derivatives lawsuit when he asked Smith to be co-counsel for the appeal



ASSOCIATED PRESS

Former Pittsburgh Steeler center Mike Webster speaks during his inauguration into the Pro Football Hall of Fame in 1997. Webster, who won four Super Bowls with the Steelers, died in 2002 at age 50.

Classifications of disability benefits

Active football: Benefits of \$224,000 a year if a player becomes totally and permanently disabled due to NFL football shortly after he stops playing.

Active non-football: Benefits of \$134,000 a year if a player becomes totally and permanently disabled from any other cause shortly after he stops playing.

Football degenerative: Benefits of \$110,000 a year if a player becomes totally and permanently disabled due to NFL football within 15 years after he stops playing.

Inactive: Benefits of \$18,000 a year (\$21,000 for new applications), or the pension the player would receive at age 55, if he becomes totally and permanently disabled and does not qualify for one of the other categories.

A disability that develops within the first six months of retiring from football is considered to have arisen "shortly after" the end of a player's career. Disabilities that surface between six and 12 months are addressed on a case-by-case basis.

Source: Congressional testimony of Douglas W. Eil, June 2007

filed in **U.S. District Court** in Baltimore in 2004, two years after Webster died. Smith argued and won the maximum benefits for Webster's estate in 2005, a decision upheld by the **4th U.S.**

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We think these are the most generous disability benefits ever negotiated, and possibly the most complex.

DOUGLAS W. ELL

Bert Bell/Pete Rozelle NFL Player Retirement Plan

Circuit Court of Appeals the following year worth more than \$1.5 million.

“Cy was a groundbreaker showing those guys can be beat,” says John V. Hogan, an Atlanta disability lawyer who has represented a couple dozen players in the administrative process.

Red tape or due process?

Douglas W. Ell, counsel for the pension plan, was traveling out of the country last week and unavailable for comment. In 2007, he testified before the House Judiciary Committee in the same hearing as Smith about the pension plan. The committee also solicited testimony from Hall of Famers Mike Ditka and Harry Carson, among others, for what it deemed an “oversight hearing.”

Ell told members of Congress that approximately \$138 million had been paid to disabled players since 1993, when the current pension plan was put in place. Many retired players receive pensions “in excess of their highest salary as a player,” he added.

A 10-year player starting in the pension plan in 2007 would have received more than \$56,000 a year when he reached age 55, and more than \$147,000 if he waited until age 65, Ell said.

“Someone who once worked for IBM or General Motors does not expect to



FILE PHOTO

Regarding pensions for former NFL players, Cy Smith says, “It’s not charity, it’s not a hand-out. It’s a collectively-bargained agreement between the union and management.”

get — and does not get — disability benefits if he or she becomes unable to work many years after leaving that employer,” Ell said. “Yet vested former NFL players who became unable to work decades later, for whatever reason, receive a disability benefit. We think these are the most generous disability benefits ever negotiated, and possibly the most complex.”

Of the more than 1,000 applicants for disability benefits since 2007, 40 percent had their benefits approved, according to Ell.

“We understand some players view this process as ‘red tape,’” Ell said, “but to the Retirement Board, and probably to the players who ultimately qualify, it is due process.”

More than 40 former NFL players have asked Smith to represent them since the Webster case, but Smith has taken on only six as clients. Every potential case involves the federal Employee Retirement Income Security Act, which governs pension and health plans in the private sector. To prevail in court, Smith must prove that the NFL's Retirement Board abused its discretion.

Four of Smith's six cases have settled, with the terms confidential. One is pending, and another was dismissed over whether the player qualified for benefits in the first place, not the severity of injuries.

The common thread among all the former players is pride, Smith says.

“They’ve been playing with all kinds of pain, some since their high school days, and they’ve just accepted that as part of the game,” he says.

There is also frustration at the breakdown of their bodies and minds, limitations preventing them from working. It's why Smith calmly bristles when people question why a player already receiving a five- or six-figure yearly pension wants more.

“It’s not charity, it’s not a handout,” he says firmly. “It’s a collectively-bargained agreement between the union and management. There’s nothing wrong or nothing greedy about asking for the benefit that your union bargained for on your behalf.”

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