

IN THE MATTER OF
SIMPLICITY PATTERN COMPANY, INC.

Docket 6221. Order and opinion, May 2, 1956

Interlocutory order denying (1) respondent's motion that hearing examiner's partial oral dismissal be construed as an initial decision, and (2) complaint counsel's appeal from such dismissal as untimely.

Before *Mr. William L. Pack*, hearing examiner.

Mr. William H. Smith, Mr. Brockman Horne and *Mr. R. D. Young, Jr.* for the Commission.

House, Grossman, Vorhaus & Hemley, of New York City, and *Mr. William Simon*, of Washington, D. C., for respondent.

ORDER DENYING INTERLOCUTORY APPEAL OF COUNSEL SUPPORTING
THE COMPLAINT AND MOTION OF THE RESPONDENT

Counsel in support of the complaint having filed an appeal from the hearing examiner's ruling of February 13, 1956, granting the respondent's motion to dismiss Count I of the complaint in this proceeding; and

The respondent having subsequently filed a motion for an order construing said rulings as an initial decision under Section 3.21 of the Commission's Rules of Practice, rather than interlocutory rulings; and

The Commission, for the reasons stated in its accompanying opinion, having concluded that said appeal and motion should not be granted:

It is ordered, That the appeal of counsel supporting the complaint, and the respondent's motion for an order construing the rulings below as an initial decision, be, and the same hereby are, denied.

Commissioner Gwynne not participating.

OPINION OF THE COMMISSION

Per Curiam:

After the reception of evidence in support of the case-in-chief was closed, oral arguments were heard by the hearing examiner in support of and in opposition to the respondent's motion to dismiss the complaint on grounds that a prima facie case was not established. The hearing examiner thereupon stated his reasons why he deemed the motion to be well taken as to the first of the two counts contained in the complaint and without merit as to the second, and orally ruled that Count I was dismissed, accordingly. In his interlocutory appeal

filed under Section 3.20 of the Commission's Rules of Practice, counsel supporting the complaint requests that we reverse the hearing examiner's rulings with respect to Count I.

The answer filed by the respondent interposes no objection to review by the Commission of the action below, but opposes reversal of those rulings; and the respondent contends that any appeal instituted by counsel supporting the complaint should be filed not under Section 3.20 which authorizes interlocutory appeals to the Commission in situations there specified, but, instead, under Section 3.22 which is the rule applicable to review of initial decisions filed by hearing examiners. This position also is adopted by the respondent in its subsequently filed motion requesting that the Commission construe the determinations below as an initial decision, so we address ourselves first to the question of the status of those rulings.

Section 3.15 confers on hearing examiners the duty of conducting impartial hearings and empowers them, among other things, to make and file initial decisions. Under the procedure provided for in Section 3.21, an initial decision becomes the Commission's decision thirty days after service thereof upon the parties in the absence of appeal or review or entry of an order staying the proceedings. Because the provision whereby such decisions may become decisions of the Commission by operation of the rule is contingent on date of "Service" upon parties and the rule additionally requires that a "copy" be served upon counsel or other representatives, it is clear that the rule contemplates that initial decisions of hearing examiners be made and filed in documentary form. Hence, one of the indispensable prerequisites to hearing officers' rulings being regarded as initial decisions under the Commission's Rules of Practice is that such adjudications be submitted in documentary form.

The Commission's Rules of Practice contemplate that initial decisions be submitted under conditions according due notice not only to parties for seasonable appeals therefrom, but also that they be filed under circumstances affording timely opportunity for the Commission's exercise of its right and duty to review such decisions in situations where appropriate. Rulings by a hearing officer at the close of the case-in-chief are made in the exercise of his delegated duties to conduct impartial hearings and with formal notice only to parties. Transcripts of hearings reflecting such rulings frequently are not made available to the Commission by the official reporter until considerable time has elapsed following dates of hearings. Only under fortuitous circumstances, therefore, would rulings of partial dismissal come to the Commission's official attention within time for it to take seasonable steps for review within the contemplation of Section 3.21.

Under the Commission's Rules of Practice as now effective, a general policy on our part of conferring initial decision status on rulings in the foregoing category would thus deprive the commission of timely opportunity for their review, and, accordingly, would violate considerations of public policy.

Some of the principles of public policy which underlie our duty to review initial decisions and the comparable duty of federal courts of appeals to review "final decisions" of district courts, pursuant to Section 1291 of Title 28 of the United States Code, are common to both. By judicial definition, a final decision under that section is one terminating the litigation on its merits and disposing of the whole matter in controversy. This interpretation reflects the historic rule of federal law against piecemeal disposal and review of litigation. Under Rule 54 (b) of the Federal Rules of Civil Procedure, an exception is created for avoiding the injustice of delay in judgment of distinctly separate claims pending adjudication of the entire case, but the effect of this provision serves in no manner to overturn the settled rule noted above. The exercise by the trial judge of this discretionary provision also is contingent on an express determination in his decision of no just reason for delay in entering final judgment and his express direction for entry of that judgment.

In the instant case, the motion to dismiss was denied by the hearing officer as to one of the two counts in the complaint and the rulings below leave issues of law and fact still to be determined. Because all rights of the parties have not been adjudicated and the oral rulings below lack other appropriate stamp of finality, we think that they do not constitute an initial decision within the meaning of the Commission's Rules of Practice. The respondent's motion that such rulings be construed to the contrary is not well taken and we hold that no initial decision has been presented here for our review.

The remaining question presented is whether the appeal of counsel supporting the complaint meets the requirements of Section 3.20 and should be entertained as an interlocutory appeal. Under that rule, counsel, to succeed in this appeal, must demonstrate to the Commission's satisfaction that the ruling appealed from involves substantial rights and will materially affect the final decision of the case and, further, that a determination of its correctness before conclusion of the trial would better serve the interests of justice.

The appeal urges that the hearing examiner incorrectly concluded that no evidence was submitted supporting inferences that the practices engaged in by the respondent and challenged in the complaint have resulted or may result in injury to customers competing in the resale of the respondent's dress patterns. The jurisdictional ground

1206

Opinion

relied upon in support of contentions that this interlocutory appeal should be decided now is that its decision would eliminate delay in the ultimate disposition of this proceeding in case of its subsequent remand by the Commission for the reception of testimony in defense of the charges contained in Count I. This manifestly would result only if the Commission subsequently held in the course of an appeal or review on the merits that the hearing officer had erred. Save in cases where palpable errors in applying the law to the facts may be apparent, the considered judgment of the hearing officer who heard the evidence and ruled on the merits of a motion to dismiss is entitled to great weight in the interlocutory stages of the proceeding. This is particularly true where, as here, the appeal is devoid of showing of prejudice to any rights asserted by appellant with respect to the presentation of his case.

A policy of entertaining appeals from rulings of partial dismissal at the close of the case on direct would be but to encourage fragmentary submission of cases for decision and piecemeal determinations and inevitably would result in unjustifiable delay. This, in the opinion of the Commission, would not "better serve the interests of justice." It follows that the appeal of counsel supporting the complaint is not one to be granted under Section 3.20 of the Commission's Rules of Practice and we are entering appropriate order in that respect.

Commissioner Gwynne did not participate in the decision of this matter.

Complaint

52 F. T. C.

IN THE MATTER OF

VAISEY-BRISTOL SHOE COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 6493. Complaint, Jan. 12, 1956—Decision, May 2, 1956*

Consent order requiring a corporate manufacturer of juvenile shoes and its advertising agency to cease advertising falsely in newspapers, magazines, etc., and by radio broadcasts, that said shoes were beneficial to the health of children, and to cease using the word "health" in referring to the shoes.

Before *Mr. James A. Purcell*, hearing examiner.

Mr. Daniel J. Murphy for the Commission.

Mr. Elmus L. Monroe, of Monett, Mo., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Vaisey-Bristol Shoe Company, Inc., a corporation, and Sam Vaisey and Joe McCaffery, individually and as officers of Vaisey-Bristol Shoe Company, Inc., Storm Advertising Company, Inc., a corporation, and Morry Storm, individually and as an officer of Storm Advertising Company, Inc., all hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Vaisey-Bristol Shoe Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business at 100 Fifth Street, Monett, Missouri. Respondents Sam Vaisey and Joe McCaffery are president-treasurer and vice president-sales manager, respectively, of said corporate respondent Vaisey-Bristol Shoe Company, Inc., and these individuals formulate, direct and control the acts, policies and practices of said corporate respondent. Their addresses are the same as that of said corporate respondent.

PAR. 2. Respondent Vaisey-Bristol Shoe Company, Inc., is now, and has been for more than one year last past, engaged in the manufacture, sale and distribution of juvenile shoes designated "Jumping-Jacks" in commerce between and among the various States of the United States and in the District of Columbia.