UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

AMERICAN CIVIL LIBERTIES UNION, OF OHIO FOUNDATION, INC.	:	**Case No. 1:01 CV 556**
Plaintiff,	:	**JUDGE KATHLEEN O'MALLEY**
v.	:	
ROBERT ASHBROOK, et al.,	:	**ORDER**
Defendant.	:	

Before the Court is Plaintiff, the American Civil Liberties Union of Ohio Foundation, Incorporated's (the "ACLU"), *Motion for an Order to Show Cause Why Defendant Should Not Be Held in Contempt* (Doc. 67). Defendant, the Honorable James DeWeese ("Judge DeWeese") has filed a Response in opposition to the ACLU's motion (See Doc. 69), the ACLU has filed a Reply in support of its Motion (See Doc. 70), and the issue is ripe for the Court's determination. For the reasons explained more fully below, the ACLU's motion is **DENIED.**

I. BACKGROUND

On June 11, 2002, this Court issued a Memorandum and Order which, *inter alia*, found the display of a framed Ten Commandments poster on the wall of a Richland County Court of Common Pleas courtroom to violate the Establishment Clause of the First Amendment and Article I, Section 7 of the Ohio Constitution, and ordered Judge DeWeese to remove immediately the display. On July 14, 2004, the Sixth Circuit decided Judge DeWeese's appeal, affirming the Court's determination. See Am. Civil Liberties Union of Ohio Found., Inc. v. Ashbrook, 375 F.3d 484, 495 (6th Cir. 2004).

On May 29, 2008, the American Civil Liberties Union Foundation of Ohio (the "ACLU") filed the *Motion for Order to Show Cause Why Defendant Should Not Be Held In Contempt* (Doc. 67) that is the subject of this order. In their motion, the ACLU contends that the Ten Commandments remain on display, or, more accurately, has been reposted in Courtroom One. In his opposition, Judge DeWeese argues that he is not in contempt because he has not redisplayed or continued to display the copy of the Ten Commandments which this Court found violative of the Establishment Clause. Instead, according to Judge DeWeese, he removed the poster that was the subject of the prior suit nearly six years ago (See Doc 69, Ex. A. Hon. James DeWeese Decl. ¶ 4), and, only in June 2006 did he redisplay "an editorial statement" which "contrasts the moral absolute and moral relativist views, and compares shorthand versions of the Ten Commandments . . . to various humanist precepts as examples of changing moral relativist principles." (Id. ¶ 9.) Thus, Judge DeWeese essentially concedes that the *text* of the Ten Commandments is on display in the courtroom, but argues that: (1) it is not the *actual* poster that was the subject of the Court's prior order; (2) it is a different version of the Ten Commandments; and (3) it contains editorial remarks and other texts that further change the nature of the display. For these reasons, Judge DeWeese argues that the current display is sufficiently different from the original subject of these proceedings and, therefore, does not violate the Court's order.

II. THE ACLU'S MOTION FOR ORDER TO SHOW CAUSE.

The crux of Judge DeWeese's argument is that "a finding that one display is unconstitutional does not preclude later attempts to install a constitutionally sound display." (See Doc. 69, at 1). In response, the ACLU argues that, while the two displays are "not literally identical, they proclaim the same message: the link between our rule of law and divine law as exemplified by the Decalogue." (See Doc. 70 at 2). The ACLU further contends: (1) that Judge DeWeese has made only minor adjustments

to the display; (2) that the Ten Commandments remains central to the new display; and (3) that the display remains inherently religious in nature and also violates the Establishment Clause. The ACLU also argues that if the Court accepts Judge DeWeese's suggestion that, because the new display is not identical it does not violate the order, the injunctive relief this Court granted would be meaningless and effectively unenforceable. Stated differently, the ACLU suggests that, if the Court declines to find Judge DeWeese in contempt, the ACLU would be required to file a new case. In that new case, assuming Judge DeWeese's new display violated the Establishment Clause, Judge DeWeese would be ordered to remove the display, but could continue to repeat the process *ad infinitum* by making minor changes and redisplaying the Decalogue. The Court finds the ACLU's arguments unpersuasive because they overlook some of the realities of the particular litigation previously before this Court, and of civil litigation generally.

A. The Standard for Showing Civil Contempt.

In a civil contempt action, the petitioner, here the ACLU, must, "prove by clear and convincing evidence that the respondent violated the court's prior order." Nat'l Labor Relations Bd. v. Cincinnati Bronze, Inc., 829 F.2d 585, 590 (6th Cir. 1987) (citation omitted). Moreover, the Court may not find Judge DeWeese in contempt unless the ACLU proves by clear, convincing evidence that he violated, "a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order." Id. (citations and internal quotations omitted). The order at issue here reads as follows: "The Court hereby **ORDERS** Judge DeWeese immediately to remove the poster of the Ten Commandments from his courtroom." (See Doc. 33 at 37 (emphasis in original).)

B. Judge DeWeese Is Not in Contempt of the Court's Order.

The parties do not dispute that Judge DeWeese had notice of this Court's 2002 order requiring him to remove the poster of the Decalogue from his courtroom. The single-sentence order, moreover, is unambiguous. The determination left for the Court, therefore, involves only the scope of the order (*i.e.*, whether the Court's 2002 order fairly can be read broadly enough to encompass the current display). As explained below, after considering the facts of this case, the Court finds that the order at issue was limited in scope to the removal of the particular Ten Commandments poster on display in Courthouse One at the time this action was originally initiated, and that the order does not serve to bar Judge DeWeese's incorporation of the Ten Commandments into his more recent display.

After examining the parties' submissions, it is clear to the Court that the current display is not the same display that the Court instructed Judge DeWeese to remove in 2002. (Compare Doc. 69, Ex. B with Doc 69, Ex. C.) While it is uncontested that the Ten Commandments remains central to the new display, the new display is not "essentially the same" as the display Judge DeWeese removed in 2002. In its 2002 order, the Court found that Judge DeWeese sourced the Ten Commandments from an encyclopedia and had them enlarged, framed, and placed on the wall of his courtroom. The previous display did not contain any commentary or caption. Instead, the prior poster was composed entirely of the Ten Commandments under the caption "The Rule of Law."

The current display, under the heading: "Philosophies of the Law in Conflict," contains a "shorthand," abbreviated version of the Ten Commandments in a column beside seven "Humanist Precepts." Surrounding the two columns of text (the Commandments and Precepts) is an approximately two-hundred word commentary discussing moral absolutes (as represented by the Ten Commandments) and moral relatives (as represented by the Humanist Precepts). The commentary was authored by Judge DeWeese, and closes with the sentence: "I join the Founders in personally acknowledging the

importance of Almighty God's fixed moral standards in restoring the moral fabric of this nation."[1] In the declaration Judge DeWeese filed with his response to the ACLU's motion for an order to show cause, he stated that the new poster is not a display of the Ten Commandments, but represents an "editorial statement based on [his] 18 years of experience as a judge" and that his closing makes clear, "that it is a statement of [his] personal opinion . . . [and not] the official opinion of Richland County or the State of Ohio." Thus, the Court's examination of the wall hanging at issue leads it to the conclusion that the new display is not the *same* as the 2002 poster. It may be true that the Ten Commandments occupies a substantial portion of the new display. The prior display, however, was composed *solely* of the Ten Commandments, whereas the new display compares the Ten Commandments with various other philosophical statements from numerous authors and incorporates Judge DeWeese's extensive commentary.

As the ACLU points out, the editorial remarks found in the closing of Judge DeWeese's new display, combined with the fact that the Decalogue remains a central focus of the new display, may indeed render the new display equally – if not more – susceptible to a constitutional challenge than the 2002 display which the Court ordered removed. As noted above, however, the limited scope of the 2002 order only required Judge DeWeese to remove the *existing* Ten Commandments poster from his wall. Accordingly, the Court will not pass on whether the new display violates the Constitution just as it would not necessarily rule on, for instance, successive claims of excessive force brought against a state actor, or any other successive claim asserting that a public official has run afoul of the Constitution. Prohibiting one public display of the Ten Commandments for violating the Establishment

[1] The lower right corner of the display states: "if you would like an explanatory pamphlet, ask the receptionist." Unfortunately, no "explanatory packet" was provided to the Court in connection with the pending motion.

Clause does not equate to an outright ban on any public display of the Ten Commandments. Adland v. Russ, 307 F.3d 471, 489-90 (6th Cir. 2002) ("While we cannot pass on the merits of plaintiffs' proposals [for alternate displays], we are nevertheless confident that with careful planning and deliberation, and perhaps consultation with the plaintiffs, the Commonwealth can permissibly display the [Ten Commandments] monument in question.").

In sum, the Court's June 11, 2002 order did not hold that *any* display of the Ten Commandments in *any* context would be violative of the Establishment Clause. Thus, the scope of this contempt proceeding is limited to determining whether Judge DeWeese has violated the prior order of this Court. As noted above, the Court's injunction provided only the narrow relief requested by the ACLU – removal of the 2002 Ten Commandments poster. While it seems clear that Judge DeWeese intends to explore the bounds of the Establishment Clause by inviting challenges based upon his use of state facilities to purportedly endorse religion, this proceeding is not an opportunity to re-litigate the issues, to seek a broader injunction, or to seek an advisory opinion as to whether the current display, if appropriately challenged by a party with standing, would violate the Establishment Clause. In short, the Court need not examine whether Judge DeWeese's current display violates *the Establishment Clause*, only whether it violates *the Court's June 11, 2002 order*. As explained above, the Court finds that it does not.

Finally, the ACLU suggests that if Judge DeWeese is permitted to avoid contempt simply by making minor alterations to the display – alterations which, according to the ACLU, render the new display "even more religiously oriented, [and] and less non-sectarian" – then the Court's order is easily circumvented and effectively unenforceable. The ACLU, however, cites no case for the proposition that, once a Court has enjoined a government actor for violating the Establishment Clause, it becomes

the proper venue for policing that government actor's potential future violations – no matter how far removed temporally. Under the circumstances present here, the Court disagrees with the notion that, by failing to hold Judge DeWeese in contempt, it invites "an endless loop of re-litigation" in cases of this nature.

In response to the ACLU, the Court notes that, under 42 U.S.C. § 1988, attorney fees and costs are often available in actions of this nature. Such a provision certainly acts as a check against the endless litigation cycle the ACLU suggests is possible. Indeed, the Court observes that the defendants in this case have previously agreed to a significant attorney fee payment. Each new display, therefore, runs the *additional* risk of an attorney fee award. If Judge DeWeese's position in any such new case were deemed frivolous, moreover, that award could be enhanced or accompanied by an appropriate sanction. Finally, though a new display may be outside the bounds of the Court's prior order, a future order could be crafted more broadly, so as to anticipate at least some range of potential future conduct. Given the clear risks attendant to litigating a frivolous claim, or, indeed, merely an unsuccessful one, as well as the potential to craft a more comprehensive injunction in the future, under the circumstances present here, the Court does not believe that its determination that Judge DeWeese is not in contempt of its 2002 order invites perpetual litigation. [2]

[2] The Court also observes that Judge DeWeese removed the original display from his courtroom in 2002 and did not redisplay the Ten Commandments in any form for a period of four years. (See Doc. 69, Ex. 1, Hon. James DeWeese Decl. ¶ 6.) Thus, it is not the case that Judge DeWeese, in an effort to circumvent the Court's order, immediately made minor changes to the original display and replaced it in his courtroom. Instead, several years passed before Judge DeWeese placed a new display in his courtroom. The length of time between the Court's original order and the hanging of the modified display undercuts somewhat the ACLU's argument that Judge DeWeese intends to endlessly re-litigate this matter. If that were true, presumably Judge DeWeese would not wait several years between displays.

III. CONCLUSION.

It is apparent that Judge DeWeese has both expanded the current display beyond the Ten Commandments alone and offered his views of the competing philosophies represented in the display. As explained above, the Court finds that the expansion of the display when combined with the editorial comments significantly changed the new display from the 2002 display. Admittedly, because the Ten Commandments remains a central focus of the new display, the question of whether the new display violates the Establishment Clause is a very real one. Because the ACLU's original complaint specifically sought only an injunction barring the defendant from exhibiting the 2002 Ten Commandments poster described in the complaint, and because the Court's injunctive relief was narrowly tailored to bar the continued exhibition of that poster, the ACLU's efforts to use the 2002 injunction to preclude the current display are misplaced. Thus, the Court can find no principled basis upon which to find that, or even fully consider whether, the new display is constitutionally impermissible.

For the foregoing reasons, the ACLU's *Motion for an Order to Show Cause Why Defendant Should Not Be Held in Contempt* (Doc. 67) is **DENIED.**

IT IS SO ORDERED.

s/Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

Dated: August 8, 2008