

TO BE PUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

JOHN ARNZEN and HAROLD
WILLIAMS,

Plaintiffs,

vs.

DIRECTOR CHARLES PALMER, et al,

Defendants.

No. C12-4001-DEO

REPORT AND RECOMMENDATION

This matter is before the court on the plaintiffs' motion for preliminary injunction (Doc. No. 15) and supporting brief (Doc. No. 21). The defendants filed a resistance (Doc. No. 19) and a supporting brief (Doc. No. 19). This matter is now fully submitted, and the undersigned issues the following report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.d.

Background

The plaintiffs are patients at the Civil Commitment Unit for Sex Offenders ("CCUSO") in Cherokee, Iowa. The defendants are officials at the facility. The defendants have installed video cameras in all of the patients' restrooms. They took this action after a patient with a serious communicable disease used a restroom to engage in consensual sex with another patient, which violated the rules of the institution.

The plaintiffs claim the cameras violate their right to privacy and that as a result, they are suffering irreparable harm. They ask the court to issue a preliminary injunction

ordering the defendants to point the cameras at the ceiling or, alternatively, to cover the camera lenses with lens caps. The defendants resist the motion, arguing that the cameras serve an important institutional purpose because they provide a method for monitoring the activities of patients in bathrooms, where there is “a high likelihood of patients acting out physically and/or sexually.” Doc. No. 20-2, p. 1. The defendants also allege that procedures have been implemented to govern the use of the cameras that protect the privacy interests of the plaintiffs.

Discussion

Legal Standard

“A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008)).

In each case, courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Amoco Production Co. [v. Gambell]*, 480 U.S. [531,] 542, 107 S. Ct. 1396, 94 L.Ed.2d 542 [(1987)]. “In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” [*Weinberger v. Romero-Barcelo*, 456 U.S. [305,] 312, 102 S. Ct. 1798, 1803 [(1982)]; see also *Railroad Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 500, 61 S. Ct. 643, 85 L.Ed. 971 (1941)].

Id. The Eighth Circuit Court of Appeals has since explained:

When evaluating whether to issue a preliminary injunction, a district court should consider four factors: (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties; (3) the probability that the movant will succeed on the merits; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981)

(en banc). A preliminary injunction is an extraordinary remedy and the burden of establishing the propriety of an injunction is on the movant. We review the denial of a preliminary injunction for abuse of discretion. An abuse of discretion may occur when the district court rests its decision on clearly erroneous factual findings or erroneous legal conclusions.

Roudachevski v. All-American Care Ctrs., Inc., 648 F.3d 701, 705-06 (8th Cir. 2011) (some citations omitted).

The “*Dataphase* factors” are consistent with the factors relevant to success on a motion for preliminary injunction articulated by the Supreme Court in *Winter*. See *Sierra Club v. U.S. Army Corps of Eng’rs*, 645 F.3d 978, 989 (8th Cir. 2011). Specifically, “[a] plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Winter*, 555 U.S. at 20. The Court clarified in *Winter* that where a defendant’s interests and the public interest outweigh the movant’s interests, as demonstrated by the movant’s showing of irreparable harm, it is unnecessary to consider whether the plaintiff has established a sufficient likelihood of success on the merits. See *id.* at 23–24; *Sierra Club*, 645 F.3d at 992-93.

The court will consider each of the pertinent *Dataphase/Winter* factors in turn, beginning with “likelihood of success on the merits.”

Likelihood of Success on the Merits

“Success on the merits has been referred to as the most important of the four factors.” *Roudachevski*, 648 F.3d at 706. In *Winter*, the Court noted that, as to the “likelihood of success” factor, “the standard for preliminary injunctive relief requires a showing of a ‘likelihood of success on the merits rather than actual success as necessary

for permanent relief.” *Sierra Club*, 645 F.3d at 993 (quoting *Winter*, 555 U.S. at 32, in turn quoting *Amoco Prod. Co.*, 480 U.S. at 546 n.12). The Eighth Circuit Court of Appeals has noted that this “preferred wording” of the standard for success differs somewhat from the “once familiar” formulation in *Dataphase* requiring the plaintiff to show that, “at the very least,” the plaintiff had “established a fair ground for litigation.” *Id.* The question is not, however, whether the district court uses the preferred wording, but whether, in light of the evidence, the district court correctly concludes that the plaintiff is likely to succeed on at least some of its claims. *Id.* at 993-94.

If the plaintiffs were not in any type of custody, the monitoring of their bathroom activities obviously would violate their privacy rights. *See United States v. Nerber*, 222 F.3d 597, 603 (9th Cir. 2000) (“[E]very court considering the issue has noted [that] video surveillance can result in extraordinarily serious intrusions into personal privacy. . . . If such intrusions are ever permissible, they must be justified by an extraordinary showing of need.” (alteration in original) (quoting *United States v. Koyomejian*, 970 F.2d 536, 551 (9th Cir. 1992) (en banc) (Kozinski, J., concurring))). On the other hand, the plaintiffs would have no right to privacy if they were being confined in a prison rather than in a civil commitment unit. *See United States v. Hogan*, 539 F.3d 916, 923 (2008) (“[S]ociety is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell” (quoting *Hudson v. Palmer*, 468 U.S. 517, 526, 104 S. Ct. 3194, 3200 (1984))); *see also Johnson v. Phelan*, 69 F.3d 144, 146 (7th Cir. 1995) (“[P]rivacy is the thing most surely extinguished by a judgment committing someone to prison.”).¹ The rights of the plaintiffs here fall somewhere between these two situations.

¹ “[A] prison inmate has a far lower expectation of privacy than do most other individuals in our society,” *Goff v. Nix*, 83 F.2d 358, 365 (8th Cir. 1986), and retains “very narrow zones of privacy.” *Hill v. McKinley*, 311 F.3d 899, 905 (8th Cir. 2002). *But see Covino v. Patrissi*, 967 F.2d 73, 78 (2d Cir. (continued...))

CCUSO is not a prison, and the plaintiffs are not convicted prisoners. They have been civilly committed to CCUSO because they have been adjudged to be “dangerous persons” under Iowa law. As such, they retain some of their liberty interests, although those interests “are considerably less than those held by members of free society.” *Senty-Haugen v. Goodno*, 462 F.3d 876, 886 (8th Cir. 2006); see *Revels v. Vincenz*, 382 F.3d 870, 874 (8th Cir. 2004) (“[a]lthough an involuntarily committed patient of a state hospital is not a prisoner per se, his confinement is subject to the same safety and security concerns as that of a prisoner,” even though the Eighth Amendment does not apply).

In *Serna v. Goodno*, 567 F.3d 944 (8th Cir. 2009), the Eighth Circuit Court of Appeals discussed the rights retained by persons involuntarily committed to a state sex offender facility:

¹(...continued)

1992) (right to bodily privacy applies “even in the prison context”); see also *Boss v. Morgan County, Mo.*, No. 2:08-cv-04195-NKL, 2009 WL 3401715, at *4 (W.D. Mo. Oct. 20, 2009), where the court held as follows:

Under Eighth Circuit law, “while inmates may lose many freedoms at the prison gate, they retain at least some of their constitutional rights while confined.” *Timm v. Gunter*, 917 F.2d 1093, 1099 (8th Cir. 1990) (citing *Turner v. Safley*, 482 U.S. 78, 84, 107 S. Ct. 2254, 96 L.Ed.2d 64 (1987)). The Eighth Circuit has further recognized that inmates have a right to bodily privacy, which must be weighed against institutional concerns of safety and equal employment opportunities. *Id.* at 1101 (“Whatever minimal intrusions on an inmate’s privacy may result from [opposite sex surveillance of male inmates by female guards], whether an inmate is using the bathroom, showering, or sleeping in the nude, are outweighed by institutional concerns for safety and equal employment opportunities.”); see also *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (recognizing “a prisoner’s constitutional right to bodily privacy because most people have ‘a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating’” (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981))); *Covino v. Patrissi*, 967 F.2d 73, 78 (2d Cir. 1992) (explaining that “we have little doubt that society is prepared to recognize as reasonable the retention of a limited right of bodily privacy even in the prison context”).

Neither we nor the Supreme Court have determined the appropriate standard for considering whether a particular search violates the Fourth Amendment rights of a person who is involuntarily civilly committed. We have, however, identified the constitutional standard applicable to an alleged violation of the Fourth Amendment rights of an involuntarily committed person based upon a seizure. *See Andrews v. Neer*, 253 F.3d 1052, 1061 (8th Cir. 2001). The plaintiff in *Andrews*, who was lawfully involuntarily committed, brought a 42 U.S.C. § 1983 suit alleging that a seizure using excessive force violated his Fourth Amendment rights. *Id.* at 1055, 1061. In a matter of first impression, we determined that such a Fourth Amendment seizure claim “should be evaluated under the . . . standard usually applied to excessive-force claims brought by pretrial detainees.” *Id.* at 1061.

In making this determination, we considered whether involuntarily committed persons are more like arrestees, pretrial detainees, or convicted prisoners. *Id.* We concluded that the best analogy is to pretrial detainees because “confinement in a state institution raise[s] concerns similar to those raised by the housing of pretrial detainees, such as the legitimate institutional interest in the safety and security of guards and other individuals in the facility, order within the facility, and the efficiency of the facility’s operations.” *Id.* Other circuits have relied upon *Andrews* in considering constitutional claims raised by involuntarily committed individuals. *See, e.g., Hydrick v. Hunter*, 500 F.3d 978, 997-98 (9th Cir.2007); *Davis v. Rennie*, 264 F.3d 86, 102, 108 (1st Cir.2001). *But see Aiken v. Nixon*, 236 F. Supp. 2d 211, 236 (N.D.N.Y. 2002) (finding civilly committed persons akin to prison visitors for the purpose of considering the constitutionality of visual body-cavity searches), *aff’d*, 80 Fed. Appx. 146, 147 (2d Cir. 2003) (unpublished).

The similarity in the grounds for detaining persons awaiting trial and persons determined to be sexually dangerous supports application of the analogy to pretrial detainees in the present case. One reason pretrial detainees are kept in custody

prior to trial is “because there is cause to believe that they are dangerous.” *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1048 (8th Cir. 1989). For example, under the Bail Reform Act of 1984, individuals charged with federal criminal offenses shall be detained prior to trial if “no condition or combination of conditions will reasonably assure . . . the safety of any other person and the community.” 18 U.S.C. § 3142(e)(1). Similarly, commitment under Minnesota law as a sexually dangerous person “requires a finding of future dangerousness.” *Hince v. O’Keefe*, 632 N.W.2d 577, 581 (Minn. 2001) (quotation omitted). An individual committed as a sexually dangerous person in Minnesota is, by statutory definition, “dangerous to the public.” Minn.Stat. § 253B.02, subdvs. 17, 18(c).

Although decided under the Due Process Clause of the Fourteenth Amendment, another Supreme Court case, *Youngberg v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452, 73 L.Ed.2d 28 (1982), further supports application of the pretrial-detainee standard in Serna’s case. There, the Court considered the constitutionality of the conditions of confinement for an involuntarily committed, mentally disabled man. *Youngberg*, 457 U.S. at 309, 102 S. Ct. 2452. In its analysis, the Court stated, “Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.” *Id.* at 321-22, 102 S.Ct. 2452. After determining that the involuntarily committed, mentally disabled man retained constitutionally protected liberty interests, the Court considered whether the infringement upon his liberty interests violated due process. *Id.* at 319-23, 102 S.Ct. 2452. The Court drew an analogy between pretrial detainees and civilly committed persons as two groups that could be subjected to liberty restrictions “reasonably related to legitimate government objectives and not tantamount to punishment.” *Id.* at 320-21, 102 S.Ct. 2452.

Against this backdrop, we can discern no justification for treating a Fourth Amendment claim based upon a search differently than a claim based upon a seizure. Thus, *Andrews*, which addresses a seizure claim, articulates the appropriate standard for considering whether an involuntarily committed person has been subjected to an unconstitutional search. *See Andrews*, 253 F.3d at 1061. *Youngberg* illustrates the strength of the analogy between civilly committed persons and pretrial detainees, concluding these groups are similar even outside the context of a Fourth Amendment claim. *See Youngberg*, 457 U.S. at 321-22, 102 S.Ct. 2452.

Serna, 567 F.3d at 948-49. Applying these principles, the court held:

[W]hile we hold that the specific facts of *Serna*'s case present a close question of constitutional law, the searches were not unreasonable. The defendants' security and treatment concerns are genuine and serious; the searches, while invasive, were conducted privately, safely, and professionally; and the facility was reacting to a recurring problem. We view *Serna*'s case as an outer limit under the *Bell*² test and, as such, caution facility administrators to recognize that courts' deference under *Bell* is not without limits.

Id. at 955-56.

"The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767, 86 S. Ct. 1826, 1834, 16 L.Ed.2d 908 (1966). The court finds that the plaintiffs have greater privacy rights than those granted to convicted prisoners, and that the defendants' use of video cameras under the circumstances of this case infringes on those rights. Accordingly, the court finds that the plaintiffs have shown that they are likely to succeed on the merits.

²*Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L.Ed.2d 447 (1979).

Irreparable Harm to the Plaintiff

“Likelihood of success” is “‘meaningless in isolation . . . [and] must be examined in the context of the relative injuries to the parties and the public.’” *Roudachevski*, 648 F.3d at 706 (quoting *Gen. Motors Corp. v. Harry Brown’s L.L.C.*, 563 F.3d 312, 319 (8th Cir. 2009)); accord *Winter*, 555 U.S. at 23-24 (there is no need to reach the “likelihood of success” factor, if the balance of interests weighs against the injunction). The court must still consider and balance the other *Dataphase/Winter* factors to decide whether to issue a preliminary injunction. Therefore, the court examines the plaintiff’s allegations of “irreparable harm.” See *Winter*, 555 U.S. at 20; *Roudachevski*, 648 F.3d at 705 (citing *Dataphase*, 640 F.2d at 114).

The movant must show that “he is likely to suffer irreparable harm in the absence of preliminary relief.” *Winter*, 555 U.S. at 20. In *Winter*, the Supreme Court clarified that, even where a plaintiff demonstrates a strong likelihood of prevailing on the merits, the plaintiff must do more than show a “possibility” of irreparable harm; rather, the proper standard “requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.” *Id.* at 22 (rejecting as “too lenient” the “possibility” of irreparable harm standard used by the Ninth Circuit Court of Appeals and the district court in the case below). “‘Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages.’” *Rogers Group, Inc. v. City of Fayetteville, Ark.*, 629 F.3d 784, 789 (8th Cir. 2010) (quoting *Gen. Motors Corp.*, 563 F.3d at 319). “To succeed in demonstrating a threat of irreparable harm, ‘a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.’” *Roudachevski*, 648 F.3d at 706 (quoting *Iowa Utils. Bd. v. Fed. Commc’ns Comm’n*, 109 F.3d 418, 425 (8th Cir. 1996)).

Here, the plaintiffs allege that the video monitoring of their bathroom activities causes them to suffer humiliation and embarrassment, and interferes with their treatment. The plaintiffs have made an adequate showing of irreparable harm.

Balance of Equities

The next *Dataphase/Winter* factor is whether the balance of equities tips in favor of preliminary injunctive relief. *Winter*, 555 U.S. at 20; *Roudachevski*, 648 F.3d at 705-06 (stating the *Dataphase* factor as “the state of the balance between [the movant’s irreparable] harm and the injury that granting the injunction will inflict on other parties” (citing *Dataphase*, 640 F.2d at 114)). “In each case, courts ‘must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.’” *Winter*, 555 U.S. at 24 (quoting *Amoco Prod. Co.*, 480 U.S. at 542).

Balancing the harm to the plaintiffs from the loss of privacy with the interests of CCUSO in monitoring the activities in patient bathrooms, the court finds that the balance of equities tips in favor of preliminary injunctive relief. *See Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982) (considering proper balance between legitimate state interests and rights of involuntarily committed to reasonable conditions of safety and freedom from unreasonable restraints). This is particularly true in light of the specific injunctive relief recommended by the court in this order.

The Public Interest

The last *Dataphase/Winter* factor requires the court to consider whether an injunction is in the public interest. *Winter*, 555 U.S. at 20; *Roudachevski*, 648 F.3d at 705–06. The court must consider both what public interests might be injured and what

public interests might be served by granting or denying a preliminary injunction. *See Sierra Club*, 645 F.3d at 997-98. “[T]he determination of where the public interest lies is also dependent on the determination of likelihood of success on the merits,” because it is in the public interest to protect rights. *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (First Amendment rights case).

The public interest in ensuring that patients not act out physically and/or sexually weighs against preliminary injunctive relief in this case. *See also Romeo*, 457 U.S. at 322-23 (“[C]ourts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized. Moreover, there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions.” (footnote omitted)). However, the court finds that in light of the specific injunctive relief recommended in this order, the public interest will be adequately protected.

In sum, the *Dataphase/Winter* factors outlined above weigh in favor of issuing a preliminary injunction in this case. The remaining question is the nature of the relief appropriate under these circumstances.

“The primary function of a preliminary injunction is to preserve the status quo until, upon final hearing, a court may grant full effective relief.” *Sanborn Mfg. Co. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 490 (8th Cir. 1993) (quoting *Rathmann Grp. v. Tanenbaum*, 889 F.2d 787, 789-90 (8th Cir. 1989), in turn quoting *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984)). The court in *Sanborn* observed that “[r]equiring [the defendant] to take affirmative action . . . before the issue has been decided on the merits goes beyond the purpose of a *preliminary* injunction.” *Id.* The court explained that, where a movant seeks on its motion for

preliminary injunction substantially the same relief it would obtain after a trial on the merits, the movant's burden is particularly "heavy." *Id.* (citing *Dakota Indus., Inc. v. Ever Best Ltd.*, 944 F.2d 438, 440 (8th Cir. 1991)).

CCUSO is appropriately concerned about activities of patients in the bathrooms at the facility, but to its credit, in its policy it has attempted to protect, at least to a certain extent, the privacy rights of its patients. The court believes it can fashion relief that will address the defendants' concerns while, at the same time, protect the plaintiffs' interests while the case is processed.

The court recommends that the plaintiffs' motion for preliminary injunction be **granted**, and that the defendants be enjoined as follows:

During the pendency of this action, video cameras may be maintained and operated in the restrooms and showers of the facility, but no one is permitted to monitor or view the video or any recordings of the video without first obtaining an order from this court authorizing such viewing. The court will authorize such viewing if the requesting party establishes that there is a reasonable suspicion that evidence of criminal behavior, sexual contact, and/or acts jeopardizing the secure and safe operation of the facility will be found on the video or on a recording of the video. Any motion requesting authorization to view a video or a recording of a video may be filed *ex parte* and under seal.

Recommendation

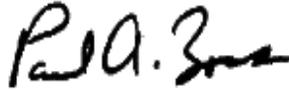
For the reasons stated above, IT IS RESPECTFULLY RECOMMENDED that the plaintiff's application for a preliminary injunction (Doc. No. 15) be **granted** consistent with the above ruling.³

³This order also terminates Docket Number 24, a *pro se* motion for temporary restraining order, which is **denied**.

Objections to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b) must be filed within fourteen days of the service of a copy of this Report and Recommendation. Objections must specify the parts of the Report and Recommendation to which objections are made, as well as the parts of the record forming the basis for the objections. *See* Fed. R. Civ. P. 72. Failure to object to the Report and Recommendation waives the right to *de novo* review by the district court of any portion of the Report and Recommendation as well as the right to appeal from the findings of fact contained therein. *United States v. Wise*, 588 F.3d 531, 537 n.5 (8th Cir. 2009).

IT IS SO ORDERED.

DATED this 12th day of April, 2012.



PAUL A. ZOSS
CHIEF MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT