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Ask the Lawyer: But He Started It!

By Mathew B. Tully

Q:

I got into a fistfight at a bar. He threw the first punch. Can I avoid an assault conviction by saying I was defending myself?

A:

No one holds a monopoly on the defense of self-defense. A service member does not forfeit the right to raise a defense of self-defense even if he or she throws the first punch. Alternatively, the target of a first punch could lose the right to self-defense if he or she responds more aggressively to this initial attack, according to military courts.

Under the Rules of Courts-Martial, service members are allowed to defend themselves if they realize that bodily harm is going to be wrongfully inflicted on them and that the use of force is necessary to prevent such bodily harm. This defense does not apply, though, if the service member provoked the attack, acted aggressively or engaged in mutual combat, and he or she did not withdraw in good faith after the provocative, aggressive or combative conduct, according to the Manual for Courts-Martial.

The amount of force used in defending oneself should not be greater than the amount of force exerted by the aggressor. By escalating a conflict, the defender can become an aggressor and lose the right to a defense of self-defense, the U.S. Court of Appeals for the Armed Forces noted in U.S. v. Lewis (2007).

CAAF's predecessor, the U.S. Court of Military Appeals, illustrated this point in U.S. v. Cardwell (1983). This case involved an Army specialist who got in a fight with a private. The incident began when the specialist took the private's chicken dinner. When the private retrieved the chicken, the specialist said something provocative to him and lightly hit him with his hand. The private responded by strangling the specialist, who then repeatedly struck the private with a beer bottle that broke and cut him.

At court martial, the specialist was convicted of assault with a means likely to inflict grievous bodily harm in violation of Article 128 of the Uniform Code of Military Justice. The military judge claimed the specialist could not raise the defense of self-defense because he provoked the attack by taking the chicken and punching the private. CMA, however, ruled otherwise, finding that the private escalated the conflict by strangling the specialist, whose use of the beer bottle then became "no more than reasonable force." The court said, "The theory of self-defense is protection and not aggression, and to keep the two in rough balance the force to repel should approximate the violence threatened."

Service members facing any type of assault charge due to their involvement in a physical altercation should consult with a military law attorney to explore whether a defense of

self-defense applies to their case.

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. The information in this column is not intended as legal advice.