Title VII is a statute that imposes liability on the employer. So the defendant in a Title VII case is always the employer – that is, the company, which may be for-profit or non-profit. See text of Title VII, p. 598. Plaintiff’s fellow workers may have done bad things, but the issue in every Title VII case is whether the employer itself has committed an unlawful employment practice.

The following scenarios already have a clear, settled analysis prior to Vance:

1. Employer only hires black applicants for unskilled positions, only hires male applicants for skilled positions, etc.
2. Boss makes sexual threats/offers to employee, fires or demotes him or her when he or she refuses. This is sex discrimination that affects the terms or conditions of employment, and so it is an unlawful employment practice under Title VII.
3. Boss sexualizes the workplace by touching the employee in inappropriate sexual ways, making sexually suggestive comments, posting sexually explicit pictures, telling sexist jokes, etc. When there is no termination, demotion, etc., the harassment must be “severe or pervasive” in order to impose liability on the employer. Such severe or pervasive harassment constitutes an unlawful “hostile work environment.” The underlying concept is that a hostile work environment affects the terms or conditions of employment on one or more of the prohibited grounds.
4. The analysis of a racialized workplace – a racially hostile work environment – is similar to that of a sexualized workplace. For example, a doctor’s office that racially segregates the patients in the waiting room creates a racially hostile work environment for the employees.
5. If the source of the harassment is plaintiff’s co-worker (someone who does not have supervisory authority over the plaintiff), then the burden is on the plaintiff to prove that the employer was negligent in controlling work conditions. Bottom of p. 596.
6. If the source of the harassment is plaintiff’s supervisor, and the harassment results in a tangible employment action (like demotion or termination), then the employer is strictly liable for the wrongful action of the supervisor. Bottom of p. 596. (This means that the plaintiff does not have to show that the employer was negligent. The plaintiff does not have to show that the employer knew or should have known that he or she was being demoted or fired for improper reasons.)
7. If the source of the harassment is plaintiff’s supervisor, and the harassment does not result in a tangible employment action (like demotion or termination), then the burden is on the employer to establish, by affirmative defense, that (1) employer exercised reasonable care to prevent and correct any harassing behavior (e.g., employer had an active harassment prevention program and complaint procedure), and (2) plaintiff unreasonably failed to take advantage of corrective opportunities that the employer provided. This is the Ellerth-Faragher affirmative defense (referring to the two cases that the Court cites at p. 596).

The analysis stated here, in all of the above scenarios, derives ultimately from the statute itself. But especially in scenarios 2-7, the analysis derives proximately from the holdings in the Supreme Court’s Title VII cases.

Note: Though Title VII does not use the word “supervisor,” the statute’s definitions section defines “employer” to include “any agent of” the employer. Thus, as Mr. Ortiz says in response to Justice Sotomayor’s question (p. 610), proposed criteria for who counts as a supervisor for purposes of hostile work environment analysis “represent an interpretation of the word ‘agent’ in Title VII.”